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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919. 20

No. ~~295~~. 324

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR.

vs.

L. COHEN GROCERY COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED MAY 6, 1920.

(27661)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 906.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

L. COHEN GROCERY COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

INDEX.

1 THE UNITED STATES OF AMERICA:

To L. Cohen Grocery Company, a corporation, defendant, greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, thirty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, wherein United States of America is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Charles B. Faris, judge of the district courts of the United States within and for the eastern district of Missouri, this 8th day of April, in the year of our Lord one thousand nine hundred and twenty.

C. B. FARIS,
United States District Judge for the Eastern District of Missouri.

1½ (Endorsed:) No. 7283. United States District Court. Eastern Division of the Eastern Judicial District of Missouri. United States of America, plaintiff, vs. L. Cohen Grocery Company, defendant. Citation. Filed Apr. 8, 1920. W. W. Nall, clerk.

We, the undersigned attorneys of record for defendant L. Cohen Grocery Company, a corporation, do hereby waive the issuance and service upon the L. Cohen Grocery Company, or upon us as its attorneys, of citation on appeal, and accept service of the same and enter the appearance of defendant herein.

Witness our hand this 8th day of April, A. D. 1920.

CHESTER H. KRUSE,
LOUIS B. SHEA,
Attorneys for L. Cohen Grocery Company, Defendant.

2 UNITED STATES OF AMERICA, ss:

The President of the United States, to the honorable judges of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between the United States of America, plaintiff, versus L. Cohen Grocery Company, a corporation, defendant, a manifest error hath happened, to the great damage of the said United States of America as by its complaint appears. We being

willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 8th day of April, in the year of our Lord one thousand nine hundred and twenty.

[SEAL.]

W. W. NAIL,
Clerk of the District Court of the United States for the Eastern District of Missouri.

21 RETURN TO WRIT.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, ss:

In obedience to the command of the within writ, I hereby transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled cause, with all things concerning the same.

In witness whereof, I have hereto subscribed my name, and affixed the seal of said District Court, at office in the city of Saint Louis, Missouri, this thirteenth day of April, A. D. 1920.

[SEAL.]

W. W. NAIL,
Clerk of said Court.

3 UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, ss:

In the District Court of the United States within and for the Eastern Division of the Eastern Judicial District of Missouri.

Be it remembered, that heretofore, to wit: On the 27th day of February, A. D. 1920, there was returned into court by the grand jury of the United States of America inquiring in and for the Eastern Division of the Eastern Judicial District of Missouri, a certain indictment against the L. Cohen Grocery Company, which said indictment was duly filed, numbered 7283, and is in words and figures as follows, to wit:

4

(Indictment.)

UNITED STATES OF AMERICA,

Eastern Division of the Eastern Judicial District of Missouri, ss:

In the District Court of the United States, within and for the Eastern Division of the Eastern Judicial District of Missouri, at the September term thereof, A. D. 1919.

The grand jurors for the United States of America, duly empaneled, sworn and charged in and for the District Court of the United States, for the Eastern Division of the Eastern Judicial District of Missouri, at the September term thereof, A. D. 1919, and inquiring in and for said division of said district, upon their oaths present and charge:

That on or about the 3d day of December, A. D. 1919, and at all times herein mentioned, while a state of war existed between the United States of America and the German Government, the L. Cohen Grocery Company was a corporation duly organized and existing under the laws of the State of Missouri, with its main office and principal place of business located at or in the immediate vicinity of 1014 North Seventh Street, in the city of St. Louis and State of Missouri; that the said L. Cohen Grocery Company then, and at all times herein mentioned, was a dealer in sugar and other necessaries, and on or about said 3d day of December, A. D. 1919, at said city of St. Louis, in the State of Missouri, and within the division and district aforesaid, and within the jurisdiction of the court aforesaid, did wilfully and feloniously make an unjust and unreasonable rate and charge in handling and dealing in a certain necessary, to wit, sugar, in this, to wit:

That it, the said L. Cohen Grocery Company, not then and there being a farmer, gardener, horticulturist, vineyardist,
5 planter, ranchman, dairyman, stockman, or other agriculturist engaged in dealing in farm products produced or raised upon any land owned, leased, or cultivated by it, on or about the said 3d day of December, A. D. 1919, at the city of St. Louis, in the State of Missouri, and within the division and district aforesaid, and within the jurisdiction of the court aforesaid, being engaged as a dealer in the necessary as aforesaid, did wilfully and feloniously demand of, and exact and collect from and of one B. Heligman, whose given name is to the grand jurors unknown and can not, therefore, be herein set out, the sum of ten dollars and seven cents ($10.07), as and for the purchase price of about fifty (50) pounds of granulated sugar then and there purchased by the said B. Heligman from the said L. Cohen Grocery Company, which said purchase price so demanded, exacted, and collected for the said granulated sugar by the said L. Cohen Grocery Company from the said B. Heligman was and constituted an unjust and unreasonable rate and charge as it, the said L. Cohen Grocery Company, then and there well knew.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

Second count.

And the grand jurors aforesaid, on their oaths aforesaid, do further present and charge:

That on or about the 8th day of December, A. D. 1919, and at all times herein mentioned, while a state of war existed between the United States of America and the German Government, the L. Cohen Grocery Company was a corporation duly organized and existing under the laws of the State of Missouri, with its main office
6 and principal place of business located at or in the immediate vicinity of 1011 North Seventh Street, in the city of St. Louis and State of Missouri; that the said L. Cohen Grocery Company then, and at all times herein mentioned, was a dealer in sugar and other necessaries, and on or about said 8th day of December, A. D. 1919, at said city of St. Louis, in the State of Missouri, and within the division and district aforesaid, and within the jurisdiction of the court aforesaid, did wilfully and feloniously make an unjust and unreasonable rate and charge in handling and dealing in a certain necessary, to wit, sugar, in this, to wit:

That it, the said L. Cohen Grocery Company, not then and there being a farmer, gardener, horticulturist, vine yardist, planter, ranchman, dairyman, stockman, or other agriculturist engaged in dealing in farm products produced or raised upon any land owned, leased, or cultivated by it, on or about the said 8th day of December, A. D. 1919, at the city of St. Louis, in the State of Missouri, and within the division and district aforesaid, and within the jurisdiction of the court aforesaid, being engaged as a dealer in the necessary as aforesaid, did wilfully and feloniously demand of, and exact and collect from and of one B. Heligman, whose given name is to the grand jurors unknown and can not, therefore, be herein set out, the sum of nineteen dollars and fifty cents ($19.50), as and for the purchase price of one bag of granulated sugar, containing in the aggregate approximately one hundred (100) pounds, then and there purchased by the said B. Heligman from the said L. Cohen Grocery Company, which said purchase price so demanded, exacted, and collected for the said granulated sugar by the said L. Cohen Grocery Company from the said B. Heligman was and constituted an unjust and unreasonable rate and charge as it, the said L. Cohen Grocery Company, then and there well knew.

7 Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

VANCE J. HUGHES,
Special Assistant to the Attorney General.

(Endorsed:) No. 7283. United States District Court. Eastern Division of the Eastern Judicial District of Missouri. The United States *vs.* L. Cohen Grocery Company. Indictment for violation of

act of August 10, 1917, and acts amendatory thereof and supplemental thereto. A true bill. Geo. W. Perry, foreman grand jury. Filed February 27, 1920. W. W. Nall, Clerk. Vance J. Higgs, Special Assistant U. S. Attorney General.

8

(Demurrer to indictment.)

In the District Court of the United States for the Eastern Division, Eastern District of Missouri.

THE UNITED STATES OF AMERICA, PLAINTIFF
vs.
THE L. COHEN GROCER COMPANY, DEFENDANT. } No. 2264.

Now and hereby entering its appearance to the above entitled indictment, the defendant, the L. Cohen Grocer Company demurs to the indictment and each count thereof and says, that they are insufficient in law and that the defendant should not be required to answer to or defend against them for the following reasons:

1. Neither count states facts sufficient to constitute an offense.

2. Neither count sufficiently, or in any manner advises the defendant of the nature and cause of the accusation against the defendant; neither count states facts which will enable to the defendant to properly prepare for trial, or advises the defendant of what it will be required to meet at such trial, and neither count states such facts as, in the event of a conviction or acquittal, will enable the defendant to plead the result in bar to a subsequent indictment for the same offense.

3. Each count of the indictment is violative of the Constitution of the United States, in this to-wit:

9 1. Congress having declared the object of the statute to be the furtherance and success of the military and naval operations of the United States in war against the German Imperial Government, and on October 22, 1919, when the penal clause on which the counts are based was enacted, the necessity for such enactment having passed because of the actual cessation of military and naval operations by the United States in such war, the Congress was without authority or power to enact such penal clause. As enacted, it was and is an invasion of the rights of the States.

2. The section of the amended statute upon which the counts are based violates the sixth amendment to the Constitution, in that it affords a person no standard or criterion by which he can, or could determine whether any act contemplated by him would be violative of the statute; it does not afford a standard, or criterion in connexity to which an indictment based upon the section will, or can advise one, accused under the section, of the nature and cause of the accusation against him; it contains and provides no definition of terms employed so that it can be determined whether an act alleged to have been done is such an act as the section prohibits; it leaves

to the determination of courts and juries what the Congress alone can determine within any lawful limitations, conditions, or circumstances.

Wherefore the defendant prays judgment, that the said indictment and each count thereof, may be for naught held and the defendant be hence discharged.

10

CHESTER H. KRUM,
LOUIS B. SHER,
For said Defendant.

(Endorsed:) Filed in U. S. District Court on March 15, 1920. W. W. Nall, clerk.

United States District Court Eastern Division of the Eastern Judicial District of Missouri.

MONDAY, MARCH 15, 1920.

UNITED STATES OF AMERICA, PLAINTIFF. *vs.* L. COHEN GROCERY COMPANY, DEFENDANT.	No. 7283. Indictment for violation of an act of Congress approved August 10, 1917, and acts amendatory thereto and supplemental thereof.

Now at this day comes the said defendant by attorney, and by leave of court files a demurrer to the indictment in this cause, which demurrer is now submitted to the court upon briefs to be hereafter presented.

11 In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

UNITED STATES OF AMERICA, PLAINTIFF. *vs.* L. COHEN GROCER COMPANY, DEFENDANT.	No. 7283.

Memorandum of court on demurrer to indictment.

The defendant, a corporation under the laws of the State of Missouri, stands indicted in this court in two counts under the amendment of October 22, 1919, of the act of August 10, 1917. To this indictment, and to both of the counts thereof, defendant demurs for that both the indictment, which follows the language of the amendment, *supra*, and the amendment itself, are insufficient to inform it of the nature and cause of the accusation against it; and, therefore, that both such indictment and the amendment itself, are violative of the sixth amendment to the Constitution of the United States.

The language of the statute which attempts to create the crime charged against defendant, so far as that language is pertinent to the specific charge against this defendant, reads thus:

12 "That it is hereby made unlawful for any person wilfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in necessaries. * * * Any person violating any of the provisions of this section upon conviction thereof shall be fined not exceeding five thousand dollars and be imprisoned for not more than two years or both." (Sec. 2, Chap. 80, Stat. 1919, amendment of Oct. 22, 1919, to the Lever Act."

Following the language of the above statute the indictment charges that defendant "did wilfully and feloniously make an unjust and unreasonable rate and charge in handling and dealing in a certain necessary, towit, sugar"; and thereupon the indictment proceeds to aver the facts of the alleged sale of sugar, in that it sets forth the date of the purchase, the name of the purchaser to whom said sugar was sold by defendant, the amount of sugar sold, and the price charged such purchaser therefor, and concludes by averring "that said purchase price so demanded, exacted and collected for the said granulated sugar, by the said L. Cohen Grocer Company from the said B. Hebigman, was and constituted an unjust and unreasonable rate and charge, as it, the said L. Cohen Grocer Company then and there well knew."

Shortly before this, in a trial in this court upon a similar indictment against this defendant, at the close of the case, and upon a demurrer *ore tenus* bottomed upon the alleged insufficiency of the evidence to convict, I took occasion in an oral charge to say to the jury this:

"The act under which this prosecution is being had was approved on the 22nd day of October, 1919, more than eleven months
13 after the signing of the armistice. It is, of course, fundamental, gentlemen, that the constitutional validity of this act depends wholly upon whether, at the time it was passed and approved, a state of war existed between the United States of America and the Imperial German Government. Clearly, in a time of peace, a statute like this could not stand under the Constitution of the United States for a single minute.

"The Federal Constitution is not a limitation upon the powers of Congress, but it is a grant of powers to Congress, and beyond the limits of that grant neither Congress nor any other coordinate branch of the Government had a right to go. Congress has no power to do anything unless power to act, either expressly or impliedly, is conferred by the terms of the organic law itself.

"So, in times of peace, the power to pass a statute like this is to be determined by the question whether the statute falls within the domain of interstate commerce, or within the domain of internal revenue. It must be within the domain of one or the other, or Congress has no power to invade the State's rights and pass it. Very

clearly, this statute is not a manifestation of the power of legislation on matters of internal revenue. Just as clearly, in my opinion, or almost as clearly, at least, it is not a matter within the domain of interstate commerce. This is so because this act deals with the commodities that are affected by it after interstate commerce has wholly ceased to deal with these commodities: after, in other words, interstate commerce has acted and the commodity has come to rest in the State—in this case, in the State of Missouri.

"But since the Supreme Court of the United States in the liquor case has seemingly ruled that a legal state of war, or a legal fiction of war, exists and will continue to exist until the ratification of the treaty of peace with the German Republic, and until the proclamation of that fact by the President, although the Imperial German Government with which the war was declared has ceased to be, I am, therefore, bound by this ruling. Consequently, whatever mental reservations I may hold personally, I take it that so far as that particular phase of the Constitution is concerned, that the act in question is valid.

"But, a most serious question is met after the constitutionality of the statute is settled, upon the point of its invasion of State's rights, the point that I have just been talking about. That
14 question is, whether the act is not too vague, indefinite, and uncertain to be enforced by the courts, and whether by reason of such vagueness, indefiniteness, and uncertainty it does not, in effect, delegate the legislative power which is vested in Congress alone to the courts and to the juries of this country; and, also, whether this act by its existing terms fixes any definite or certain rule by which human conduct can be uniformly governed. In other words, the question arises—a serious question arises: Does it inform the accused of the nature and cause of the accusation against him, as the sixth amendment to the Constitution of the United States specifically and certainly requires? I can not be brought to think so, gentlemen.

"Briefly: This statute makes it a felony for any person—which, I take it, includes a corporation as well—wilfully to make any unjust or unreasonable charge in dealing in any necessary. It nowhere defines what is unjust or what shall be deemed unreasonable. It leaves it to the jury to find what particular thing it is that the law has made a felony of. One jury might very well say that a profit or charge of one cent a pound on sugar, above cost and carriage, is unjust and unreasonable, and so a felonious act; while another jury might says that a charge of twenty-five cents was not unjust and unreasonable. No criminal statute, gentlemen, ought to be so vague and uncertain as that the citizen can not at any given moment know whether he is a felon or a patriot.

"In the presence of the existing rapacity and greed of the profiteer, I confess it has been difficult for me to approach this question in a judicial frame of mind. It is to me a matter of most sincere regret that I find it my duty to say, so far as the application of this

law to the fact presented in this identical case is concerned, that it is invalid, for the reason I have stated. It is regrettable that a law which was intended to be as beneficent as this law is intended to be, and which was intended and designed to remedy a most outrageous and crying evil, should be found to fall short by reason of constitutional difficulties of the end sought to be attained. There never was a time when a curb of human greed and rapacity was so urgently demanded as it is demanded now, and I repeat, that the abhorrence I feel of the selfish hoggishness of the profiteer is such that I can scarcely deal with the question with the amount of judicial aplomb with which I ought to deal with it.

15 "But, in my opinion, gentlemen, these considerations do not warrant ruthless over-riding of the rights of the citizen to have stated in a criminal statute the certain and definite rights which hedge him about as a citizen, and the certain and definite definition by which he, or his counsel, can ascertain whether or not he is guilty of a felony.

"Congress alone has power to define crimes against the United States. This power cannot be delegated to the courts or to the juries of this country. * * *

"Therefore, because the law is vague, indefinite, and uncertain, and because it fixes no immutable standard of gilt, but leaves such standard to the variant views of the different courts and juries which may be called on to enforce it, and because it does not inform defendant of the nature and cause of the accusation against him, I think it is constitutionally invalid, and that the demurrer offered by the defendant ought to be sustained."

To these views thus orally expressed I am constrained to adhere, notwithstanding the fact that my attention has been called to certain cases which, it is urged, give color to the contention that statutes equally as vague, uncertain, and indefinite as that here involved have nevertheless been upheld by the Supreme Court of the United States as constitutionally valid. These cases are Standard Oil Company vs. United States, 221 U. S., 106; Nash vs. U. S., 229 U. S., 273; and Waters-Pierce Oil Company vs. Texas, 212 U. S., 86.

The case of Standard Oil Co. vs. United States, *supra*, was a civil proceeding by injunction and for dissolution into its constituent elements for monopolization and restraint of trade, and it was not a criminal proceeding, such as is this at bar. The statute upheld in the Standard Oil case upon an attack analogous to this (or

16 so far analogous as a civil case may be to a criminal one) were sections 1 and 2 of the so-called Sherman Anti-Trust Act. (Sections 1 and 2, act of July 2, 1890, chap. 647, 26 Stat., 209.) These sections denounced and declared unlawful all monopolies and combinations and conspiracies in restraint of trade. Aiding the view taken in the above case by the Supreme Court of the United States, reliance to a large extent was had upon the ancient common law definitions and crimes of engrossing and monopolizing. Since the above case was not a criminal one but a civil action, no occa-

sion arose therein for any reference to or consideration by either court of counsel of the provisions of the sixth amendment to the Federal Constitution, and none such was made.

Neither was the case of Waters-Pierce Oil Company vs. Texas, *supra*, a criminal case but a civil case in the nature of *quo warranto*. The trial thereof in the Texas State courts was had under certain statutes of that State, which provided as punishment for the violation thereof ouster and the assessment of certain penalties. Not the sixth amendment but that phrase of the fourteenth amendment touching due process of law was alone involved. (Waters-Pierce Oil Co. vs. Texas, *supra*, l. c. 111.) While the attack involved the alleged vagueness and indefiniteness of the Texas Statutes, these statutes clearly defined a monopoly. (Waters-Pierce Oil Co. vs. Texas, *supra*, l. c. 99.) For the rest, what is said touching the Standard Oil case, *supra*, applies also to the Waters-Pierce case.

17 The case of Nash vs. United States, supra, was, however, a criminal case under sections 1 and 2, supra, of the Sherman Antitrust Act. The indictment in the Nash case was in two counts, one of which charged a conspiracy in restraint of trade, and the other a conspiracy to monopolize. It may or may not be a suggestive feature that there was originally also a third count which charged Nash with monopolization. This count was held to be bad on demurrer below and thereafter fell out of the case.

In the course of the opinion in the Nash case it was pointed out that no overt act, nothing, indeed, beyond the bare conspiracy itself, need be either charged or proven: that the Sherman Antitrust Act punishes the conspiracies at which it is leveled on the common-law footing, and therefore does not make the doing of any act other than the act of conspiracy itself a condition of liability. Thus the Supreme Court justified the statutory crimes and conspiracies to monopolize, and conspiracies in restraint of trade, which are denounced by the Sherman Act by a relegation for their constituent elements back to the common-law definitions of the crimes of engrossing, monopolies and contracts in restraint of trade. (3 Coke Inst. 181, chap. 85; 1 Hawkins P. C., chap. 29; 5 and 6 Edw. VI, chap. 14; Standard Oil Co. vs. United States, 221 U. S., l. c. 51.) Just here the query may logically arise as to where at common law is there any crime defined or denounced as "making an unjust or unreasonable charge in dealing in any necessary"?

18 After the Nash case was ruled, the Supreme Court of the United States again had occasion to refer to it and distinguish it in a case arising under the constitution and laws of the State of Kentucky. (International Harvester Co. vs. Kentucky, 234 U. S., 216.) Plaintiff in error in the above case was convicted and fined in the courts of the State of Kentucky under certain statutes passed pursuant to provisions of the Kentucky constitution, which permitted the legislature to enact such laws as might be necessary to prevent all trusts "from combining to depreciate below its real

value any article, or to enhance the cost of any article above its real value." The statutes passed by the Legislature of Kentucky made it lawful to enter into any combination for the purpose of controlling prices, "unless for the purpose or with the effect of fixing a price that was greater or less than the real value of the article." The Supreme Court of the United States held that neither the constitution of Kentucky nor the statutes above referred to, and passed pursuant to the constitution, offered any standard of conduct that it is possible to know in advance and comply with, and that such provisions, as a consequence, were invalid. (International Harvester Co. vs. Kentucky, 234 U. S., 223.)

Distinguishing the Nash case from what was said in the International Harvester case, the Supreme Court said:

"We regard this decision as consistent with Nash v. United States (229 U. S., 373, 377), in which it was held that a criminal law is not unconstitutional merely because it throws upon men the risk of rightly estimating a matter of degree—what is an undue restraint of trade. That deals with the actual, not the imaginary, condition other than the facts. It goes no further than to recognize that, as with negligence, between the two extremes of the obviously illegal and the plainly lawful there is a gradual approach, and that the complexity of life makes it impossible to draw a line in advance without an artificial simplification that would be unjust. The conditions are as permanent as anything human, and a great body of precedents on the civil side coupled with familiar practice make it comparatively easy for common sense to keep to what is safe. But if business is to go on, men must unite to do it and must sell their wares. To compel them to guess on peril of indictment what the community would have given for them if the continually changing conditions were other than they are, to an uncertain extent; to divine prophetically what the reaction of only partially determinate facts would be upon the imaginations and desires of purchasers, is to exact gifts that mankind does not possess." (234 U. S., 223.)

While no reference was made by the Supreme Court in the above excerpt to the fact that common law crimes (which form the very foundation stones of the offenses denounced in the Sherman Anti-trust Act) were being dealt with in the Nash case, it is yet clearly obvious that the distinguishing features, as between the two classes of cases, brings this case into that class represented by the Kentucky Statutes, rather than the common-law class represented by the Nash case. Indeed, upon principle, I am unable to distinguish the instant case from the Kentucky case. No man would engage in business, and no self-respecting man would remain in business, if his fortune, good name, or liberty is to be determined solely by the heated and prejudiced views of what is unjust and unreasonable which may be entertained by a jury personally embarassed and harrassed, it may be, by the inordinate rise in prices of all commodities. Such a law may be fit for the trial of the guilty; but laws ought to

20 be fit both to try the guilty and the innocent. A law which is fit only to try those who are guilty necessarily begs the question of guilt, and is, therefore, no better than lynch law.

The definitions, boundaries, and limits of a criminal statute ought, at least, to be so clear that no man in his right mind can be in doubt when he is violating and when he is not violating such statute. There ought not to be necessary any chopping of logic or intricate reasoning from cause to effect in order to decide the question of criminality.

If this law is to stand, then no longer would there seem need of defining crimes by separate statutes. All that will be necessary will be to pass a single sweeping statute, declaring that any person who shall commit any unjust or unreasonable act, or any wrongful or criminal act, shall be deemed guilty of a felony; and leave it to the jury to determine what is unjust, or unreasonable, wrongful, or criminal.

Neither is justification for the indefiniteness and uncertainty which inhere in the statute under discussion to be found in any alleged necessity to mitigate a present and crying evil which all right-thinking men must deprecate and abhor; for it would seem that it might simply have been declared that a sale of any necessary for a stated percentage increase in price, beyond cost and carriage, should be a punishable crime. At least, such a law would not be objectionable on the ground here urged. That it would have been arbitrary may be conceded. But the statute here is just as arbitrary, and to
21 its arbitrariness is added an indefiniteness, vagueness, and uncertainty, which is dangerous, beyond excusing, to the property and liberty of innocent men.

For these reasons, and for others which I might add if leisure allowed, I think the demurrer to the indictment ought to be sustained.

(Signed) C. B. FARIS,
District Judge.

(Endorsed): Filed in U. S. District Court on April 8, 1920. W. W. Nall, Clerk.

22 United States District Court, Eastern Division of the Eastern Judicial District of Missouri.

THURSDAY, APRIL 8, 1920.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
L. COHEN GROCERY COMPANY, A CORPORATION, DEFENDANT.

No. 7283. Indictment for violation of an act of Congress approved August 10th, 1917, and acts amendatory thereof and supplemental thereto.

The court having fully considered the demurrer of defendant to the indictment in this cause, doth

Order that the said demurrer be and the same is hereby sustained, to which ruling the said plaintiff excepts. Memorandum of opinion filed.

23 In the District Court of the United States for the Eastern Division of the Eastern District of Missouri.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
L. COHEN GROCERY COMPANY, DEFENDANT. } No. 7283.

Petition for Writ of Error.

Now on this the 8th day of April, A. D. 1920, comes the above named plaintiff, United States of America, by Vance J. Higgs, Special Assistant to the Attorney General of the United States of America, its attorney, and complains that in the record and proceedings had in said cause, and also in the rendition of the decision and judgment in the above-entitled cause in said United States District Court for the Eastern Division of the Eastern District of Missouri, at the March term thereof, against said plaintiff, on the day of April, A. D. 1920, manifest error occurred to the great damage of said plaintiff in the decision and judgment of said District Court of the United States, in sustaining the demurrer to the indictment therein, which said decision and judgment is based upon the construction of the statute upon which said indictment, and each count thereof, is founded, to-wit, section 4 of the act of Congress approved August 10, 1917, as amended by the act of October 22,
24 1919, which said amendatory act of October 22, 1919, is entitled "An act to amend an act entitled 'An act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel' approved August 10, 1917, and to regulate rents in the District of Columbia."

Wherefore, this plaintiff, in accordance with the provisions of the act of March 2, 1907 (section 1704, United States Compiled Statutes 1916), prays for the allowance of a writ of error in said cause, and for such other orders and process as may cause the errors here complained of to be corrected, and the decision and judgment in said proceedings to be reversed by the Supreme Court of the United States of America.

VANCE J. HIGGS,
Special Assistant to the Attorney General, of the United States of America, Attorney for Plaintiff.

(Endorsed:) Filed in U. S. District Court on April 8, 1920, W. W. Nall, clerk.

25 **In the District Court of the United States for the Eastern Division of the Eastern District of Missouri.**

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
L. COHEN GROCERY COMPANY, DEFENDANT. } No. 7283.

Assignment of errors.

Now on this the 8th day of April, A. D. 1920, comes the United States of America, plaintiff herein, by Vance J. Higgs, special assistant to the Attorney General of the United States of America, and says that in the record and proceedings in the above-entitled matter there is manifest error in this, to wit:

First, that the court erred to the injury of the United States of America in sustaining the demurrer filed by defendant to the indictment, and to each count thereof, in this cause, on the ground that that portion of section 4 of the act of Congress approved August 10, 1917, as amended by the act of Congress approved October 22, 1919, entitled "An act to amend an act entitled 'An act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel,' approved August 10, 1917, and to regulate rents in the District of Columbia," upon which said indictment is predi-
26 cated, is unconstitutional and invalid, and by entering a judgment discharging defendant herein from all criminal liability under said section of said act:

Second, that the court erred to the injury of the United States of America in its construction of said section of said act by its decision and judgment in sustaining said demurrer to the indictment in this cause:

Third, that the court erred to the injury of the United States of America in sustaining, and not overruling, said demurrer to the indictment in this cause:

Fourth, that the court erred to the injury of the United States of America in deciding said demurrer to the indictment against the plaintiff and in favor of the defendant:

Wherefore the United States of America prays that said decision and judgment of said District Court of the United States for the Eastern Division of the Eastern District of Missouri may be reversed, annulled, and held for naught, and that the said United States of America may be restored to all things which it has lost, occasioned by said decision and judgment.

VANCE J. HIGGS,
Special Assistant to the Attorney General of the United States of America, Attorney for Plaintiff.

(Endorsed:) Filed in U. S. District Court on April 8, 1920. W. W. Nall, Clerk.

27 In the District Court of the United States for the Eastern Division of the Eastern District of Missouri.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
L. COHEN GROCERY COMPANY, DEFENDANT. } No. 7283.

Order allowing writ of error.

Upon motion of Vance J. Higgs, special assistant to the Attorney General of the United States, attorney for plaintiff herein, and on filing its petition for an order allowing writ of error, together with an assignment of errors, it is

Ordered, that a writ of error be allowed to the Supreme Court of the United States of America from the decision and judgment, entered April 8th, A. D. 1920, sustaining the demurrer filed by defendant herein to the indictment, and each count thereof, in the above-entitled cause, and that a certified transcript of the record and proceedings herein be forthwith transmitted to the said Supreme Court of the United States.

This the 8th day of April, A. D. 1920.

C. B. FARIS,
Judge, United States District Court, Eastern District of Missouri.

(Endorsed:) Filed in U. S. District Court on April 8, 1920, W. W. Nall, Clerk.

28 In the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
L. COHEN GROCERY COMPANY, DEFENDANT. } No. 7283.

Election to take typewritten transcript, and praecipe therefor.

To the Honorable W. W. NALL,
Clerk of the United States District Court for the Eastern District of Missouri.

You are hereby notified that, a writ of error having heretofore been allowed in this cause to the Supreme Court of the United States, the plaintiff herein, the United States of America, elects to take a typewritten, instead of a printed, transcript of all the proceedings had in this cause, same to include the indictment, the demurrer to the indictment, the petition for writ of error, the order allowing the writ of error, the writ of error together with your return thereon, as clerk of the United States District Court, the assignment of errors of the United States of America, and the citation together with the

acceptance of service endorsed thereon by Chester H. Krum and Louis B. Sher, attorneys for defendant, said L. Cohn Grocery Company, same to be certified to the clerk of the Supreme Court,
29 and to be incorporated in the transcript to be printed under the supervision of said clerk of the Supreme Court of the United States.

NANCE J. HUGH,
Special Assistant to the Attorney General of the United States of America, Attorney for Plaintiff.

Enclosed: Filed in U. S. District Court, on April 8, 1920, W. W. Nall, clerk.

30. **(Clerk's Certificate to Transcript.)**

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, ss:

I, W. W. Nall, clerk of the District Court of the United States within and for the Eastern Division of the Eastern Judicial District of Missouri, do hereby certify that the above and foregoing is a full, true, and complete transcript of the record and proceedings, in cause No. 7283 of United States of America, Plaintiff, vs. L. Cohen Grocery Company, prepared in accordance with the praecipe of counsel for Plaintiff, as fully as the same remains on file and of record in said cause in my office; and that the original citation and writ of error are hereto attached and herewith returned.

In witness whereof, I hereunto subscribe my hand and affix the seal of said District Court at office in the city of St. Louis, in said division and district this 13th day of April, A. D. 1920.

[SEAL.] W. W. NALL,
Clerk of said District Court.
By EUGENE C. FISHER,
Deputy Clerk.

(Endorsed:) File No. 27,661. E. Missouri, D. C. U. S. Term No. 906. The United States of America, Plaintiff in Error, vs. L. Cohen Grocery Company. Filed May 6th, 1920. File No. 27,661.

No. ~~806~~. 314

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

v.

L. COHEN GROCERY COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

MOTION BY THE UNITED STATES TO ADVANCE.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1920

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

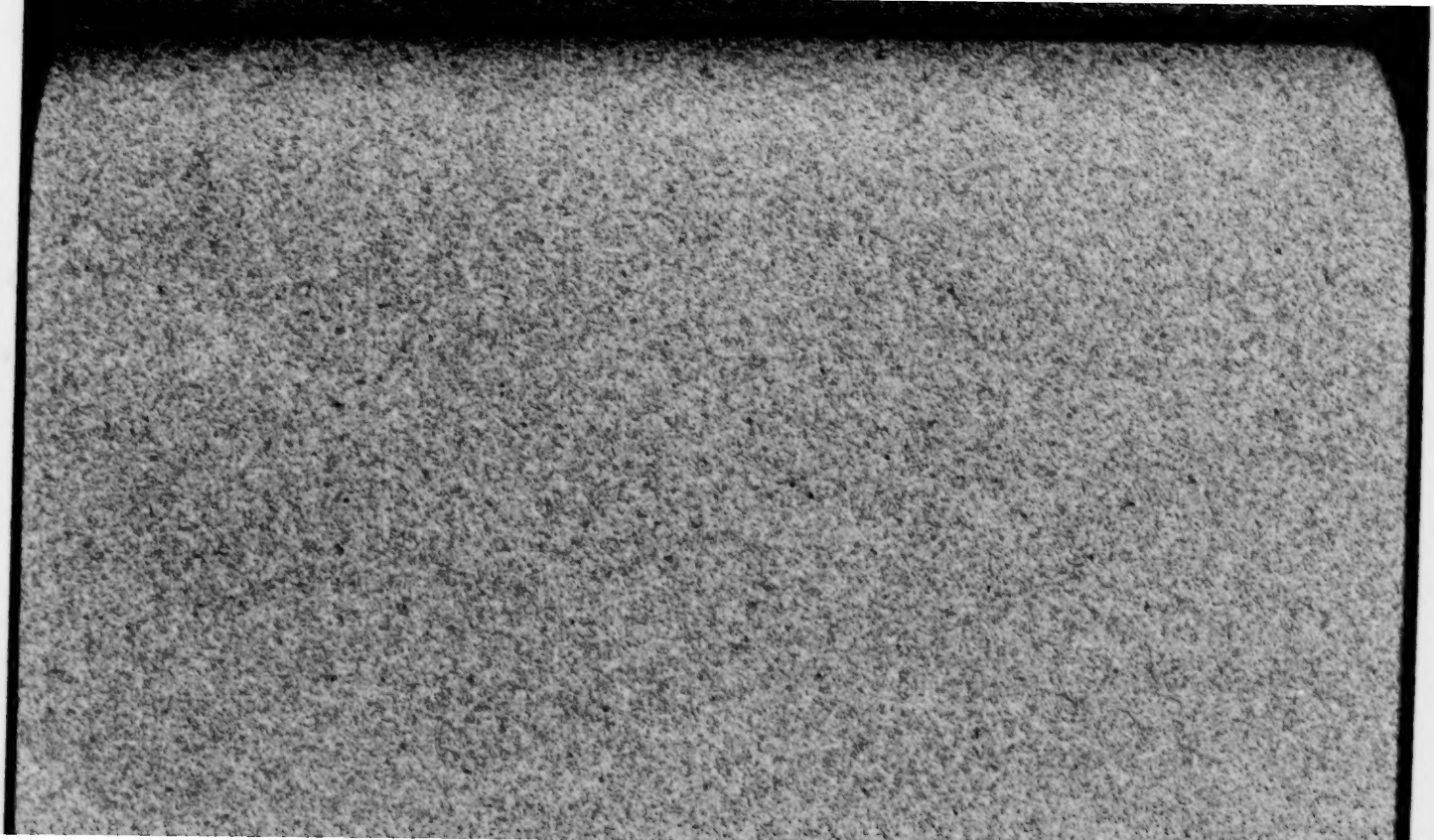
THE UNITED STATES OF AMERICA, plaintiff in error,
v.
L. COHEN GROCERY COMPANY.
No. 906.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General, and in accordance with the provisions of the Criminal Appeals Act of March 2, 1907, c. 2564 (34 Stat. 1246; Comp. Stat. 1916, sec. 1704), respectfully moves the advancement of the above-entitled cause for early hearing during the October, 1920, term of this Court.

The defendant in error was indicted under section 4 of the act of August 10, 1917, c. 53 (40 Stat. 277), commonly known as the Lever Act, as amended by the act of October 22, 1919, Title I, section 2 (41 Stat. 298), declaring it unlawful for any person "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries," and authorizing fine or imprisonment, or both, for violation of its terms.



No. 324.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

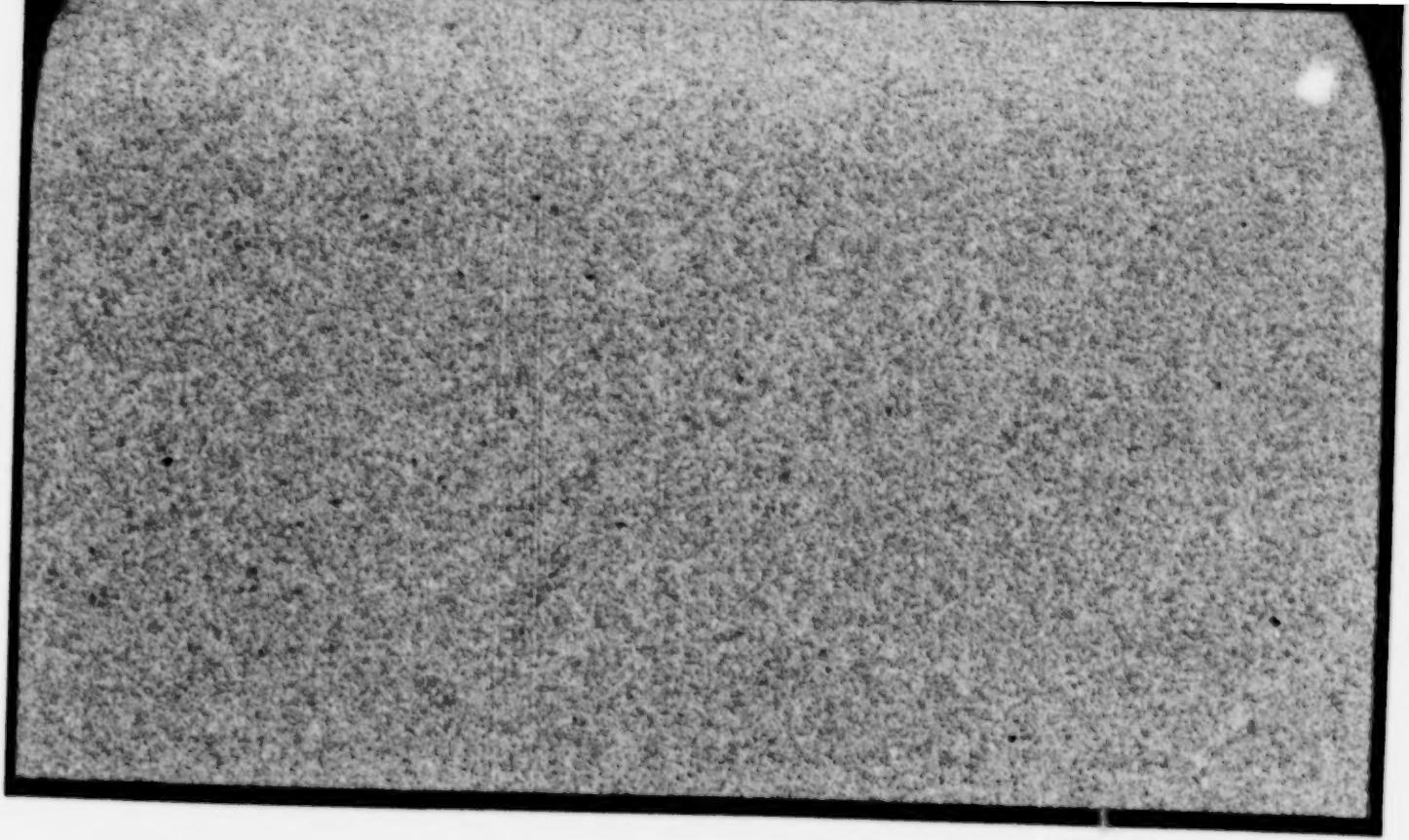
v.

L. COHEN GROCERY COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

BRIEF FOR THE UNITED STATES.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1920



INDEX.

AUTHORITIES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

UNITED STATES OF AMERICA, PLAINTIFF in Error,
v.
L. COHEN GROCERY COMPANY.
No. 324.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

BRIEF FOR THE UNITED STATES.

This is one of several cases involving the constitutionality of section 4 of the Act of August 10, 1917 (40 Stat., c. 53, p. 276), known as the Food Control or Lever Act, as amended by section 2 of the Act of October 22, 1919 (41 Stat., 1st Session, c. 80, p. 297).

It is here on writ of error to review the judgment of the District Court sustaining a demurrer to an indictment charging the defendant in error with selling sugar at an unjust and unreasonable rate and charge.

STATUTES INVOLVED.

The Food Control or Lever Act was passed "to assure an adequate supply and equitable distribution, and to facilitate the movement of foods, feeds, fuel,

including fuel oil and natural gas, and fertilizer and fertilizer ingredients, tools, utensils, implements, machinery, and equipment required for the actual production of foods, feeds, and fuel," which are defined as necessaries, and to "prevent, locally or generally, scarcity, monopolization, hoarding, injurious speculation, manipulations, and private controls, affecting such supply, distribution, and movement; and to establish and maintain governmental control of such necessaries during the war." Section 4 of the Act is as follows:

> That it is hereby made unlawful for any person willfully to destroy any necessaries for the purpose of enhancing the price or restricting the supply thereof; knowingly to commit waste or willfully to permit preventable deterioration of any necessaries in or in connection with their production, manufacture, or distribution; to hoard, as defined in section six of this Act, any necessaries; to monopolize or attempt to monopolize, either locally or generally, any necessaries; to engage in any discriminatory and unfair, or any deceptive or wasteful practice or device, or to make any unjust or unreasonable rate or charge, in handling or dealing in or with any necessaries; to conspire, combine, agree, or arrange with any other person, (a) to limit the facilities for transporting, producing, harvesting, manufacturing, supplying, storing, or dealing in any necessaries; (b) to restrict the supply of any necessaries; (c) to restrict distribution of any necessaries; (d) to prevent, limit, or lessen the

> manufacture or production of any necessaries in order to enhance the price thereof, or (e) to exact excessive prices for any necessaries; or to aid or abet the doing of any act made unlawful by this section.

By other sections of the Act a violation of this section in several of the respects mentioned was made a criminal offense. But as to others, instead of making the Act an offense to be prosecuted, the enforcement of the law was to be accomplished through a license system, and the carrying on of the business without a license was made a criminal offense. This system was provided by section 5, which was as follows:

> That, from time to time, whenever the President shall find it essential to license the importation, manufacture, storage, mining, or distribution of any necessaries, in order to carry into effect any of the purposes of this Act, and shall publicly so announce, no person shall, after a date fixed in the announcement, engage in or carry on any such business specified in the announcement of importation, manufacture, storage, mining, or distribution of any necessaries as set forth in such announcement, unless he shall secure and hold a license issued pursuant to this section. The President is authorized to issue such licenses and to prescribe regulations for the issuance of licenses and requirements for systems of accounts and auditing of accounts to be kept by licensees, submission of reports by them, with or without oath or affirmation, and the

entry and inspection by the President's duly authorized agents of the places of business of licensees. Whenever the President shall find that any storage charge, commission, profit, or practice of any licensee is unjust, or unreasonable, or discriminatory and unfair, or wasteful, and shall order such licensee, within a reasonable time fixed in the order, to discontinue the same, unless such order, which shall recite the facts found, is revoked or suspended, such licensee shall, within the time prescribed in the order, discontinue such unjust, unreasonable, discriminatory and unfair storage charge, commission, profit, or practice. The President may, in lieu of any such unjust, unreasonable, discriminatory, and unfair storage charge, commission, profit, or practice, find what is a just, reasonable, nondiscriminatory and fair storage charge, commission, profit, or practice, and in any proceeding brought in any court such order of the President shall be prima facie evidence. Any person who, without a license issued pursuant to this section, or whose license shall have been revoked, knowingly engages in or carries on any business for which a license is required under this section, or willfully fails or refuses to discontinue any unjust, unreasonable, discriminatory and unfair storage charge, commission, profit, or practice, in accordance with the requirement of an order issued under this section, or any regulation prescribed under this section, shall, upon conviction thereof, be punished by a fine not exceeding $5,000, or by imprisonment for not more than two years, or

both: *Provided*, That this section shall not apply to any farmer, gardener, cooperative association of farmers or gardeners, including livestock farmers, or other persons with respect to the products of any farm, garden, or other land owned, leased, or cultivated by him, nor to any retailer with respect to the retail business actually conducted by him, nor to any common carrier, nor shall any thing in this section be construed to authorize the fixing or imposition of a duty or tax upon any article imported into or exported from the United States or any State, Territory, or the District of Columbia: *Provided further*, That for the purposes of this Act a retailer shall be deemed to be a person, copartnership, firm, corporation, or association not engaging in the wholesale business whose gross sales do not exceed $100,000 per annum.

It will be seen, therefore, that, under this Act, the making of an unjust or unreasonable rate or charge in handling or dealing in necessaries was not made a criminal offense. The President, however, was given power to require that persons engaged in the importation, manufacture, storage, mining, or distribution of necessaries should first secure a license under authority from him. He was given authority to revoke the license of any licensee found making any unreasonable or unjust commission or profit, if such licensee should fail to discontinue such charges upon being ordered to do so. This method, of course, was effective, because of the provision that a person doing business after the revocation of his license should be

subject to a fine of not exceeding $5,000 or imprisonment for not more than two years, or both. The President exercised the authority conferred by this Act through the Food Administration, and thus, by administering a system of licenses, controlled the prices of necessaries, to the end that they should not be unjust or unreasonable.

After the Food Administration went out of existence, however, and the system of licenses was not longer continued, the declaration of section 4, that it shall be unlawful to make unjust or unreasonable rates or charges in handling or dealing in necessaries, became practically a dead letter because there was no way to enforce it. Congress deemed it unwise or unnecessary to continue the Food Administration as it had existed during actual hostilities. Instead, it passed the Act of October 22, 1919 (41 Stat., 1st Session, c. 80, p. 297), amending the Lever Act. By the first section of the Act of October 22, 1919, wearing apparel and certain other articles were added to the list of articles included in the definition of "necessaries" in the original Act.

Section 2 is as follows:

> That section 4 of such Act of August 10, 1917, is hereby amended to read as follows:
>
> "That it is hereby made unlawful for any person willfully to destroy any necessaries for the purpose of enhancing the price or restricting the supply thereof; knowingly to commit waste or willfully to permit preventable deterioration of any necessaries in or in connection with their production, manufacture, or

distribution; to hoard, as defined in section 6 of this Act, any necessaries; to monopolize or attempt to monopolize, either locally or generally, any necessaries; to engage in any discriminatory and unfair, or any deceptive or wasteful practice or device, or to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries; to conspire, combine, agree, or arrange with any other person (a) to limit the facilities for transporting, producing, harvesting, manufacturing, supplying, storing, or dealing in any necessaries; (b) to restrict the supply of any necessaries; (c) to restrict distribution of any necessaries; (d) to prevent, limit, or lessen the manufacture or production of any necessaries in order to enhance the price thereof; or (e) to exact excessive prices for any necessaries, or to aid or abet the doing of any act made unlawful by this section. Any person violating any of the provisions of this section upon conviction thereof shall be fined not exceeding $5,000 or be imprisoned for not more than two years, or both: *Provided*, That this section shall not apply to any farmer, gardener, horticulturist, vineyardist, planter, ranchman, dairyman, stockman, or other agriculturist, with respect to the farm products produced or raised upon land owned, leased, or cultivated by him: *Provided further*, That nothing in this Act shall be construed to forbid or make unlawful collective bargaining by any cooperative association or other association of farmers, dairymen, gardeners, or other producers of farm products with respect

> to the farm products produced or raised by its members upon land owned, leased, or cultivated by them."

It will be observed that it is thus made a criminal offense, punishable by fine and imprisonment, "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries," and this is the offense with which the defendant in error is charged.

THE INDICTMENT.

The indictment contains two counts. The first count charges that the defendant in error, a dealer in sugar and other necessaries, on or about the 3d day of December, 1919, "did willfully and feloniously make an unjust and unreasonable rate and charge in handling and dealing in a certain necessary, to wit, sugar, in this, to wit:"

> That it, the said L. Cohen Grocery Company, not then and there being a farmer, gardener, horticulturist, vineyardist, planter, ranchman, dairyman, stockman, or other agriculturist engaged in dealing in farm products produced or raised upon any land owned, leased, or cultivated by it, on or about the said 3d day of December, A. D. 1919, at the city of St. Louis, in the State of Missouri, and within the division and district aforesaid, and within the jurisdiction of the court aforesaid, being engaged as a dealer in the necessary as aforesaid, did willfully and feloniously demand of, and exact and collect from and of one B. Heligman, whose given name is to the grand jurors

unknown and can not, therefore, be herein set out, the sum of ten dollars and seven cents ($10.07), as and for the purchase price of about fifty (50) pounds of granulated sugar then and there purchased by the said B. Heligman from the said L. Cohen Grocery Company, which said purchase price so demanded, exacted, and collected for the said granulated sugar by the said L. Cohen Grocery Company from the said B. Heligman was and constituted an unjust and unreasonable rate and charge as it, the said L. Cohen Grocery Company, then and there well knew (Rec. p. 3.)

The second count charges a similar transaction in exactly the same form.

THE DEMURRER.

Defendant in error, by its demurrer, presents the following contentions:

1. That the indictment did not sufficiently or in any manner advise the defendant of the nature and cause of the accusation or state facts which would enable the defendant to properly prepare for trial or advise it of what it will be required to meet at the trial, or such facts as, in the event of a conviction or acquittal, will enable the defendant to plead the result in bar to a subsequent indictment for the same offense.

2. That Congress having declared the object of the statute to be the furtherance and success of the military and naval operations of the United States in the war against the German Imperial Government

was without authority to pass the Act of October 22, 1919, for the reason that the necessity for such an enactment had passed because of the actual cessation of the military and naval operations by the United States, and hence that that Act was an invasion of the rights of the States.

3. That the second section of the Act of October 22, 1919, violates the Sixth Amendment to the Constitution in that it affords no standard or criterion by which he can or could determine whether any act contemplated by him would be violative of the statute; it does not afford a standard or criterion in conformity to which an indictment based upon the section will or can advise one accused under the section of the nature and cause of the accusation against him; it contains and provides no definition of terms employed so that it can be determined whether an act alleged to have been done is such an act as the section prohibits; it leaves to the determination of courts and juries what the Congress alone can determine within any lawful limitations, conditions, or circumstances. (Rec., pp. 5–6.)

RULING OF THE COURT BELOW.

The District Judge, in acting upon the demurrer, held that, since a state of war existed on October 22, 1919, Congress could at that time lawfully exercise its war powers, and that the fact that actual hostilities had ceased did not interpose any constitutional obstacle in the way of the passage of an Act of this kind. He, however, held that section 2 of the Act was too vague, indefinite, and uncertain to be enforced by the

courts and that it, in effect, delegated legislative power to the juries of the country by not fixing any definite or certain rule by which human conduct can be uniformly governed, and upon this ground sustained the demurrer and quashed the indictment. (Rec., pp. 6–12.)

BRIEF.

This case has been advanced and set for hearing on the same day with several other cases involving the same statutes. In some of these cases objections have been made to the statute which have not been suggested in this case. This brief will be confined to a discussion of the questions raised and passed on in the court below. If any of the other questions shall be brought into the argument in this case, the Government's reply will be found in its brief in the case in which those questions were passed on in the court below.

I.

Both in August, 1917, and in October, 1919, when the Acts in question were passed, Congress, in the exercise of its war powers, had full authority to enact all proper legislation to assure an adequate supply and equitable distribution of the necessaries of life.

The first contention made against the statute is that the offense charged was not a crime under the laws of the United States until the passage of the Act of October 22, 1919, and that, at that time, Congress was without power to enact such legislation because actual hostilities in our war with Germany had

ceased. The District Judge correctly held that this contention was not tenable. It is readily conceded that ordinarily legislation of this kind is not within the power of Congress to enact. But when war is declared, the manhood and all the resources of the country are subject to the call of the Government, to the end that the war may be successfully prosecuted. For the raising of armies the Government may draft every man in the country for such service as he is capable of rendering, but a war can not be fought by simply raising armies.

Arms, munitions, and subsistence must be provided for the men in the field. For this purpose, the resources of the Nation must be husbanded and conserved. Those not in the field must produce the things necessary for the support of the army. While thus engaged it is of vital importance to the Government and to the success of the war that they themselves shall have the means of subsistence. It is not denied, therefore, that in 1917, when the war was raging and when the Lever Act was passed, Congress had the power to enact legislation necessary to accomplish the purposes recited in that Act. The act charged in the indictment, however, was not made a criminal offense by that Act, and the insistence is that when actual hostilities ceased the power of Congress to enact legislation for the purposes recited in the original Act also ceased. This, however, involves entirely too narrow a view of the war powers of Congress. These powers are not limited to the things that are necessary to enable

armies to fight. They include all those things which are necessary not only to bring the war to a successful end but to restore the country to peace conditions. In order to fully accomplish the ends for which the war was fought, it may be necessary for Congress to exercise some of its war powers even after a formal declaration of peace. It is not necessary, however, to go that far in this case. There has not yet been a declaration of peace. An armistice, it is true, was signed before the Act of October, 1919, was passed, but the signing of an armistice is not the conclusion of a war. On the contrary, it expressly recognizes the existence of a state of war and is nothing but an agreement between the belligerents to temporarily suspend actual hostilities for the purpose of negotiating terms of peace. At the time the Lever Act was passed Congress was evidently of the opinion that it would not be necessary to continue in force the extraordinary measures then being taken to conserve the resources of the country for war purposes longer than the date of the termination of the war, but that it would be necessary to continue them in force that long. It was therefore provided under section 24—

> That the provisions of this Act shall cease to be in effect when the existing state of war between the United States and Germany shall have terminated, and the fact and date of such termination shall be ascertained and proclaimed by the President.

The question, therefore, is whether Congress may exercise its war powers until the termination of the

war has been ascertained and proclaimed by the President. The answer to this question seems to admit of but little doubt. A declaration of war brings the country into a state of war. When this occurs the duty of determining to what extent armies shall be raised and the resources of the country husbanded for the purposes of the war devolves upon Congress uncontrolled by the courts. The power is in Congress, and the extent to which it shall be exercised is committed to the discretion of Congress. The country at large, including individual judges, may entertain the opinion that only a very small army is necessary. But if Congress thinks a very large army will be required there is both the duty and the power to raise such an army. Congress, in other words, is made the judge of the necessities of the occasion. So, when an armistice is signed, it may be the general opinion that conditions are such that the resumption of hostilities is an impossibility and that, therefore, for all practical purposes, the war is at an end. It may accordingly be very generally felt that it is not necessary to continue in force war measures. But, again, Congress is the judge. If a mistake is made and a resumption of hostilities finds the country unprepared, a terrible responsibility rests upon Congress. Until the war is formally ended, no man can say, with absolute certainty, that hostilities will not be resumed and both men and resources required for the further prosecution of the war. Congress may conclude that, in view of conditions as they exist, the probability of a resumption of hostilities is so remote

that the temporary armies which have been raised may be demobilized and many of the preparations for a continued warfare discontinued. In this condition it may conclude that all war measures may be safely abandoned. But, on the other hand, it may conclude that the armies may be demobilized without endangering the safety of the country only upon condition that, until peace is formally declared, such conditions shall be maintained that new armies may be quickly organized and equipped. In other words, during the period of an armistice Congress possesses all the powers which it possessed as a result of the declaration of war and is, as it has been during the entire period of the war, the sole judge of the extent to which it is necessary to exert these powers in order to properly protect the country and to meet any emergency that it thinks may probably arise before peace is fully accomplished. Thus it was said in *Stewart* v. *Kahn* (11 Wall. 493, 506):

> The measures to be taken in carrying on the war and to suppress insurrection are not defined. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution.

In other words, when a state of war exists, the duty of taking necessary measures for the protection of the country is committed by the Constitution to Congress, and it must determine the question as to what measures are necessary. And in the same

case, speaking of the war power of Congress, it was said that —

> the power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress. (11 Wall. 507.)

The powers of Congress, therefore, which were called forth by the declaration of war, continue to exist until a victory in the field, and then until Congress is satisfied that there is no danger of an immediate renewal of the conflict, and then until the conditions peculiar to war which have arisen in its progress have been removed. The right to exercise these powers is in no wise arrested by the signing of an armistice. The necessity for their exercise may be reduced to a minimum or even entirely removed, but all arguments as to the lack of a necessity for their exercise must be addressed to Congress and not to the courts so long as a state of war exists. It was for these reasons that this court held constitutional a prohibition act passed six days later than the Act now in question. (*Ruppert* v. *Caffey*, 251 U. S. 264; *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146.) These cases are conclusive of the question now made and fully justify the ruling of the District Judge on this question.

II.

The war conditions were such as to make it imperative that Congress exert whatever power it had to encourage the production of necessaries and to regulate their prices.

It will scarcely be denied that, when the Lever Act was passed, there were war conditions furnishing ample—indeed controlling—reasons for the exertion by Congress of whatever power it had to encourage the production, compel the conservation, and regulate the prices of the necessaries of life. A world war had been in progress for three years. Practically all the great nations were involved. Millions of men had been withdrawn from agricultural and industrial pursuits to compose the contending armies. The industry of the world, except in this and a few other countries, was paralyzed. This country itself had recently entered the war. Millions of its active, producing men were to become soldiers. There was already a shortage throughout the world of foodstuffs and other necessaries. This shortage was becoming more acute every day. This Government itself was under the necessity of providing subsistence for the immense armies which it was raising. Hundreds of thousands of its citizens must be used in the activities peculiar to the war itself. The raising of its armies was creating a shortage in labor throughout the land. These conditions, under all the control that could be exerted by any Government, were certain to result in a rapid enhancement in the cost of the necessaries of life. This would affect the

Government itself as the largest purchaser of such necessaries and, at the same time, would affect the wellbeing of every person within the United States. Both the Government and the public at large were vitally interested. It was unavoidable that the cost of living should, for these reasons, become burdensome. Moreover, the conditions existing were such as have always appealed to the cupidity of those who would sacrifice the public interest to secure unconscionable gains for themselves. A government that would fail to exert all its legitimate powers to minimize these burdens would be criminally remiss and deserving of the severest condemnation. It can not be denied, therefore, that there was an occasion for the exertion of the most drastic power consistent with the Constitution, and that hence the only question now is whether the measures enacted were within the constitutional powers of Congress.

III.

The regulation of the prices of the necessaries of life is a proper governmental function which, when deemed necessary for the prosecution of a war, Congress may exercise.

The regulation of prices of the necessaries of life, so far as it is a proper governmental function, belongs, under our system, in time of peace, to the States rather than to the Federal Government, except to the extent that it may be accomplished through the exertion of some of the powers expressly conferred upon Congress. It is, in its nature, a police power

and thus, generally speaking, is reserved to the States. It has, however, been too often decided to require the citation of authorities that, in the exertion of its express powers, Congress may exert such police power as may be necessary to make effective the powers conferred upon it. It follows, as was said in the recent prohibition cases, that, with respect to any subject with which Congress may deal in a war measure, it may exert all the police power which a State could ordinarily exert over the same subject. Hence, if, in time of peace, a State may control and regulate the prices of necessaries the Federal Government may do the same when necessary as a war measure.

A State under our system has all of the governmental powers which, before the Revolution, inhered in the British Government, save only those which have been since surrendered to the Federal Government. A State government may exert all such powers except as restricted by the State constitution. This proposition can now scarcely be open to debate. In *Munn* v. *Illinois* (94 U. S. 113, 124), this court, when considering a statute of Illinois limiting the charges which could lawfully be made by grain warehouses, had occasion to examine very carefully into the powers of State governments with respect to such matters and said:

> When the people of the United Colonies separated from Great Britain, they changed the form, but not the substance, of their government. They retained for the purposes

> of government all the powers of the British Parliament, and through their State constitutions, or other forms of social compact, undertook to give practical effect to such as they deemed necessary for the common good and the security of life and property. All the powers which they retained they committed to their respective States, unless in express terms or by implication reserved to themselves. Subsequently, when it was found necessary to establish a national government for national purposes, a part of the powers of the States and of the people of the States was granted to the United States and the people of the United States. This grant operated as a further limitation upon the powers of the States, so that now the governments of the States possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people.

From time immemorial the government of England has exercised the power to forbid any and all practices which had the effect of unduly enhancing the price which the people must pay for necessaries. "Forestalling the market," "engrossing the market," and "regrating" were offenses under the common law. They are defined by Blackstone (Tucker, vol. 4, pp. 159–160), as follows:

> The offense of forestalling the market is also an offense against public trade. This, which (as well as the two following) is also an offense at common law, was described by statute 5 and 6 Edward VI, chap. 14 [enacted A. D. 1552–

1553], to be the buying or contracting for any merchandise or victual coming in the way to market; or dissuading persons from bringing their goods or provisions there; or persuading them to enhance the price, when there; any of which practices makes the market dearer to the fair trader.

Regrating was described by the same statute to be the buying of corn, or other dead victual, in any market, and selling it again in the same market, or within four miles of the place. For this also enhances the price of the provisions, as every successive seller must have a successive profit.

Engrossing was also described to be the getting into one's possession, or buying up, large quantities of corn, or other dead victuals, with intent to sell them again. This must, of course, be injurious to the public, by putting it in the power of one or two rich men to raise the price of provisions at their own discretion. And so the total engrossing of any other commodity, with intent to sell it at an unreasonable price, is an offense indictable and finable at the common law. And the general penalty for these three offenses by the common law (for all the statutes concerning them were repealed by 12 Geo. III, c. 71) is, as in other minute misdemeanors, discretionary fine and imprisonment.

The ultimate object of these rules of law was obviously to prevent those dealing in the necessaries of life from extorting from the consumer unreasonable prices. When necessary to prevent this, the common

law thus went so far as to absolutely prohibit the buying for resale and of course an added profit—under certain conditions.

With respect to the laws above referred to, it is said in Russell on Crimes (7th Ed., vol. 2, p. 1919):

> Every practice or device by act, conspiracy, words or news, to enhance the price of victuals or other merchandise, was held to be unlawful at common law; as being prejudicial to trade and commerce, and injurious to the public in general. Practices of this kind came under the notion of forestalling, which meant buying goods on the way to market or inducing persons not to take the goods to market in order to enhance prices or evade tolls. It was treated as including engrossing, or buying up standing corn, or corn in sheaf, or victuals wholesale for the purpose of regrating; that is, selling at monopoly prices, and all other offenses of like nature.

The purpose and object of these common-law rules and their relation to the freedom of trade are well shown in the case of *King* v. *Waddington* (1st East, pp. 143, 163), decided in 1800, where it was said:

> In mitigation of punishment the Court has been repeatedly and strongly addressed upon the freedom of trade; as if it were requisite to support the freedom of trade that one man shall be permitted for his own private emolument to enhance the price of commodities become necessaries of life, and thereby possibly prevent a large portion of his majesty's subjects from purchasing those necessaries at all.

> The freedom of trade, like the liberty of the press, is one thing; the abuse of that freedom, like the licentiousness of the press, is another. God forbid that this Court should do anything that should interfere with the legal freedom of trade. * * * But the same law that protects the proprietors of merchandise takes an interest also in the concerns of the public, by protecting the poor man against the avarice of the rich; and from all time it has been an offense against the public to commit practices to enhance the price of merchandise coming to market, particularly the necessaries of life, for the purpose of enriching an individual. The freedom of trade has its legal limits.

Since practices such as have been referred to were unlawful under the common law, for the sole reason that they unduly enhanced prices, the object of that law was to regulate prices and keep them within reasonable limits. The power to forbid these practices, of course, implies the power to directly prohibit the thing which such practices would accomplish. Obviously, if prices could be kept within reasonable limits merely by prohibiting certain practices which affect them, a government would not find it necessary to undertake the difficult task of itself fixing prices. Ordinarily, such fixing of prices will not be necessary when everything which interferes with free and open competition is forbidden. But the British Government from the earliest times has never hesitated to actually fix prices when other means have been

found inadequate, or to require, in general terms, that vendors of necessaries sell them at reasonable prices and moderate gains. The Statute of Laborers, passed in 1349 (2 Stat. of England, c. VI, pp. 26, 28), provided that all sellers of victuals should be bound to sell them "for a reasonable price having respect to the price that such victual be sold at in the places adjoining, so that the same sellers have moderate gains, and not excessive." The Statute of Herrings (1357) (2 Stat. of England, p. 117) fixed the price of herrings. The Statute of 1363 (2 Stat. of England, p. 162), in chapter 5, after reciting that grocers engross all manner of merchandise by combination in gilds, selling that which is most dear and keeping in store the other, it was provided that a merchant should deal in only one kind of merchandise. By chapter 3 of the same statute the price of poultry was fixed, and by chapter 15 the prices of clothes. In 1389 justices of the peace were authorized to fix wages according to circumstances, and it was provided that victuallers "shall have reasonable gains, according to the discretion and limitation of said justices, and no more, upon pain to be grievously punished. (2 Stat. of England, c. 8, pp. 313–314.) In 1433 the price of candles was fixed by the price of plain wax. (3 Stat. of England, c. XII, p. 196.) In 1487 the prices of cloths and hats were fixed by a maximum rate. (4 Stat. of England, c. VIII, IX, p. 41.) In 1531 brewers were prohibited from charging higher prices for ale and beer "than shall be thought convenient and sufficient

by the discretions of the justices of the peace within every shire" or by the officials of cities, boroughs, and towns. (4 Stat. of England, c. V, p. 220.) In 1533 it was provided that whenever complaint was made of enhancing the price of victuals certain state officials should have power from time to time "to set and tax reasonable prices of all such kinds of victuals." (4 Stat. of England, c. II, pp. 263, 264.) In 1536 certain officials were authorized to set the price of wines. (4 Stat. of England, c. XIV, p. 439.) In 1549 all persons were prohibited from buying butter and cheese to sell again, unless they sold by retail in open market. (5 Stat. of England, c. XXI, p. 347.) In 1709 the price of bread was fixed by the price of wheat. (12 Stat. of England, c. XVIII, p. 77.) Numerous other similar statutes could be cited, but the above sufficiently illustrate governmental practices under the common law. That the power to enact such laws passed to and remains in the several States of the Union has always been recognized by this court. In the case of *Munn* v. *Illinois*, *supra*, at pp. 124–125, the Chief Justice said:

> When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. "A body politic," as aptly defined in the preamble of the Constitution of Massachusetts, "is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good."

This does not confer power upon the whole people to control rights which are purely and exclusively private (*Thorpe* v. *R. & B. Railroad Co.*, 27 Vt. 143); but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim *sic utere tuo ut alienum non laedas*. From this source come the police powers, which, as was said by Mr. Chief Justice Taney in the *License Cases* (5 How. 583), "are nothing more or less than the powers of government inherent in every sovereignty, * * * that is to say, * * * the power to govern men and things." Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property. With the Fifth Amendment in

force, Congress, in 1820, conferred power upon the city of Washington "to regulate * * * the rates of wharfage at private wharfs, * * * the sweeping of chimneys, and to fix the rates of fees therefor, * * * and the weight and quality of bread" (3 Stat. 587, sec. 7); and, in 1848, "to make all necessary regulations respecting hackney carriages and the rates of fare of the same, and the rates of hauling by cartmen, wagoners, carmen, and draymen, and the rates of commission of auctioneers" (9 id. 224, sec. 2).

From this it is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular; it simply prevents the States from doing that which will operate as such a deprivation.

The Chief Justice then proceeded to inquire into the principle upon which this power of regulation rests and said (pp. 125–126):

Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is "affected with a public interest, it ceases to be *juris privati* only." This was said by Lord Chief Justice Hale more than two hundred years ago in his treatise *De Portibus Maris* (1 Harg. Law Tracts, 78), and

> has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but so long as he maintains the use, he must submit to the control.

After referring to certain English authorities the court, at page 129, illustrated the application that had been made of these principles in this country in the following language:

> In later times, the same principle came under consideration in the Supreme Court of Alabama. That court was called upon, in 1841, to decide whether the power granted to the city of Mobile to regulate the weight and price of bread was unconstitutional, and it was contended that "it would interfere with the right of the citizen to pursue his lawful trade or calling in the mode his judgment might dictate;" but the court said, "there is no motive * * * for this interference on the part of the legislature with the lawful actions of individuals, or the mode in which private property shall be enjoyed, unless such calling affects the public interest,

> or private property is employed in a manner which directly affects the body of the people. Upon this principle, in this State, tavern-keepers are licensed; * * * and the County Court is required, at least once a year, to settle the rates of innkeepers. Upon the same principle is founded the control which the legislature has always exercised in the establishment and regulation of mills, ferries, bridges, turnpike roads, and other kindred subjects." (*Mobile* v. *Yuille*, 3 Ala. N. S. 140.)

The Alabama case just cited involved the validity of a city ordinance regulating bakers, prescribing the weight of loaves of bread and fixing the prices at which they should be sold. In sustaining the ordinance, the court said (p. 141):

> Where a great number of persons are collected together in a town or city, a regular supply of wholesome bread is a matter of the utmost importance.

So, during a great war, a regular supply of the necessaries of life at prices which are not prohibitive is a matter of the same public concern. If, in time of peace, a municipality may, for the protection of a limited part of the public, fix the price of bread, surely the Federal Government, possessing, so far as necessary for the conduct of a war, the same power, may do likewise.

The Government, both State and Federal, has never hesitated to regulate and control such business as that of common carriers, water companies, gas companies, and similar corporations. Although in the

Munn case it was said, in plain terms, that when private property is "affected with a public interest it ceases to be *juris privati* only" and that "property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large," an effort was for a time made to limit the scope of the decision in that case. Astute lawyers thought they found in the language employed by the court justification for the contention that the right of governmental control and regulation applied only to such corporations as, by reason of special privileges enjoyed, were under the obligation to serve all the public alike, or a business which was monopolistic in character. But after elaborate consideration, the doctrines announced in the *Munn* case were amplified and reaffirmed in *Budd* v. *New York* (143 U. S. 517) and *Brass* v. *Stoeser* (153 U. S. 391). Speaking of the latter case in *German Alliance Insurance Co.* v. *Kansas* (233 U. S. 389, 410), the court said:

> The case is important. It extended the principle of the other two cases and denuded it of the limiting element which was supposed to beset it—that to justify regulation of a business the business must have a monopolistic character.

And again, at page 411:

> The cases need no explanatory or fortifying comment. They demonstrate that a business, by circumstances and its nature, may rise from private to be of public concern and be subject, in consequence, to governmental regu-

> tion. And they demonstrate, to apply the language of Judge Andrews in *People* v. *Budd* (117 N. Y. 1, 27), that the attempts made to place the right of public regulation in the cases in which it has been exerted, and of which we have given examples, upon the ground of special privilege conferred by the public on those affected can not be supported. "The underlying principle is that business of certain kinds holds such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation."

It was upon this principle that insurance was held to be so impressed with a public interest as to be subject to governmental control and regulation, even to the extent of fixing rates. It is upon the same principle that banking and similar business are included in the same governmental control.

It has thus been definitely settled that to be subject to governmental control, as the public interests may require, it is not necessary that a business either enjoy special privileges or be monopolistic. Enough appears if, by reason of its nature and existing circumstances, it affects the public at large and is of public concern.

To illustrate: It is difficult to see how it can be said that the laws in force everywhere limiting the rate or charge for the use of money do not offend against the liberty of contract, but that a law which, to protect the public and the Government itself, under the stress of famine or war, forbids an unrea-

sonable charge for handling and dealing in the food necessary to sustain life does so offend.

The baker has been a favorite target for these statutes for the purpose of regulating prices. The reason doubtless is that his product is of prime necessity even for the poorest. His is no more a public business than that of the grocer or any other merchant dealing in necessaries. The public interest with which his business is impressed arises alone from the fact that he makes and sells that which the public must have. The same character of public interest attaches to the business of every man who offers for sale to the public any of the necessaries of life. If the one is subject to governmental regulation and control, the other must be equally so. It would seem beyond doubt, therefore, that it is one of the inherent governmental powers to control dealers in the necessaries of life with respect to their prices and profits whenever such action becomes necessary for the protection of the public. While, ordinarily, this power resides in our State governments, for the reason that it is not necessary to the effective exertion of the powers which the Federal Government may exercise in times of peace, yet when the Federal Government is confronted with a state of war which requires for the defense of the nation and the prosecution of the war a husbanding and conservation of all the resources of the country, such measures as are necessary to accomplish that result are within the powers of Congress. The laws now in question were enacted under conditions that required Congress to exert its war power.

The object it sought to accomplish was one which it was its duty to accomplish if possible. The only question then would seem to be whether the means actually adopted are subject to any constitutional objection.

A Government possessed of the ordinary governmental powers, such as a State Government, or Congress, when legislating for the District of Columbia, may fix the rate of interest at which money may be loaned, the price at which bread may be sold or chimneys swept. So far as necessary for the conduct of the war, the Federal Government has all these powers and, in addition, may put any citizen in its armies at nominal wages. Is it conceivable that such a Government may not regulate the prices which commission merchants and brokers may charge for services necessary to the well-being of the families of the men at the front? If, for the protection of the public, one may be required to become a soldier at nominal wages, is there any reason for saying that the Government may not, to protect itself and the public from those whose greed would take advantage of war conditions, limit the profits which a merchant may derive from capital invested in the things which are necessary to sustain life? The right to exact usury or to extort unreasonable profits from the dire necessities of the nation can not be more sacred than human life or the right of a citizen to follow the avocation of his choosing rather than become a soldier.

IV.

The nature and effect of the Lever Act and the amendatory Act of 1919.

In August, 1917, when this country had entered in earnest into the war, Congress passed the Lever Act. Its object, as stated above, was, for the protection both of the Government and the public, to prevent undue inflation in the prices of those things which it was necessary for the Government to have for its soldiers and for all the people to have for their subsistence. It was a difficult problem. It was impracticable for Congress by a statute to fix a schedule of prices. War conditions would undoubtedly increase the cost of labor and make uncertain the expense of producing any article. If a price had been fixed on certain staples in August, 1917, it might be, 30 days later, impossible to produce those articles at the prices fixed. So many things entered into the legitimate making of prices that, under any kind of system of control, they were certain to vary from time to time during the war. The absolute fixing of prices by Congress might practically stop production, and certainly would tend to diminish production when it was of vital importance that production should increase. The underlying purpose of the Act was to guard and protect the Government and the public against those who might be disposed to take advantage of war conditions to secure to themselves, out of the necessities of the public, extortionate profits. Again, it was impracticable to

lay down any fixed and unvarying schedule of profits that would be reasonable. No rule that would fix a certain percentage of cost price as a legitimate profit could, with justice, be uniformly applied. The rate of profit that may be legitimately charged varies with the cost of handling different articles and in different lines of business.

What Congress undertook to do, then, was to prohibit certain things the natural tendency of which would be to enhance prices, and to retain to the Government such control as might become necessary under varying circumstances. Accordingly, section 4 of the Lever Act made it unlawful (1) to destroy or waste necessaries; (2) to hoard them; (3) to monopolize or attempt to monopolize them; (4) to engage in any discriminatory and unfair practices, or in deceptive or wasteful practices in handling them; (5) to conspire to limit production, to restrict distribution, or to exact excessive prices for necessaries. Some of these forbidden things—such as the hoarding of necessaries—were declared to be offenses for which the offender should be prosecuted criminally. The sale of necessaries, however, at excessive prices was not in and of itself made a criminal offense. Congress apparently felt that prices could be better controlled in another way. Accordingly, by section 5 of the Act, it empowered the President to require a license for the importation, manufacture, storage, mining, or distribution of any necessaries, and expressly gave him the power to withhold or revoke the license of any dealer who sold his goods at unjust, unreasonable,

discriminatory, or unfair prices or profit. This section was to be enforced through the provision that any person required to have a license who should do business without obtaining it should be subject, upon conviction, to fine and imprisonment. Under this section, the President organized the Food Administration, and, through it, administered a license system, by which he controlled the prices of necessaries. After the armistice, however, and when it seemed probable that actual hostilities would not be resumed, Congress evidently felt that it was not longer necessto appropriate the funds necessary to continue the expensive Food Administration, and the licensing system went out of existence. Prices were high and seemed to be going higher. The cost of living had become an acute question, which the President called to the attention of Congress. The amendatory Act of October, 1919, was the result. The pertinent part of that Act is that it is made a criminal offense "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries." It is a violation of this provision of the law with which the defendant in error is charged.

V.

The constitutionality of the statutes in question has been the subject of controversy in many of the lower courts with conflicting results.

These Acts have been assailed in many jurisdictions upon the two grounds upon which they were assailed in this case and the further ground that, by

reason of the exemption in favor of farmers and others, they are void on account of an arbitrary classification in their application.

The contention that Congress was without power to enact laws of this general nature, either in August, 1917, or October, 1919, has been nearly if not quite uniformly rejected by the courts.

Only two cases appear to have reached a circuit court of appeals involving the other two objections to the constitutionality of these Acts. One is the case of *Hulett C. Merritt* v. *United States* (264 Fed. 870). This was a prosecution under the original Lever Act, in which a violation of section 6, prohibiting the hoarding of necessaries, was charged. That section defines hoarding, among other things, to be necessaries "held, contracted for, or arranged for by any person in a quantity in excess of his reasonable requirements for use or consumption by himself and dependents for a reasonable time." Exactly the same objections that are now made against the Act of October, 1919, were urged—that is, that the Act was too vague and uncertain to admit of enforcement as a criminal law, and also that it was void on account of arbitrary classification through the exemption of farmers and others. Both contentions were rejected by the Circuit Court of Appeals for the Ninth Circuit, and a petition for certiorari is now pending before this court.

The only case in a circuit court of appeals directly involving a charge of selling necessaries at unreasonable prices, as prohibited by the Act of October,

1919, is *C. A. Weed & Co.* v. *Stephen T. Lockwood*, decided by the Circuit Court of Appeals for the Second Circuit, but not yet reported. This case, upon full consideration of all the questions now made, was disposed of in favor of the Government and the Act of October, 1919, held constitutional and valid.

Many of the District Judges have had occasion to consider these questions and quite generally, but with some exceptions, the Government's contention has been sustained and the Acts in question upheld.

The provision against hoarding contained in section 6 of the original Act, though almost equally with the provision as to reasonable prices subject to objections now made, has given rise to but little controversy, and, so far as considered at all by the lower courts, has been sustained. In addition to the ruling by the Circuit Court of Appeals of the Ninth Circuit above referred to, this section has been held constitutional by Judges Garvin and Chatfield, in New York, and by Judge Lewis, in Colorado, in the case of *United States* v. *Swedlow* (264 Fed. 1016), and by the District Court for the Southern District of California.

In District Court cases the constitutionality of the Act of October, 1919, prohibiting the making of unjust and unreasonable charges for necessaries, has been sustained in the following reported cases:

Weed & Co. v. *Lockwood*, 264 Fed. 453 (decided by Judge Hazel, in New York).

United States v. *Oglesby*, 264 Fed. 691 (decided by Judge Sibley, in Georgia).

United States v. *Rosenblum*, 264 Fed. 378 (decided by Judge Thomson, in Pennsylvania).

United States v. *Spokane Dry Goods Co.*, 264 Fed. 209 (decided by Judge Rudkin, in Washington).

United States v. *Myatt*, 264 Fed. 442 (decided by Judge Connor, in North Carolina).

The same ruling has been made in the following unreported cases:

United States v. *Goldsmith*, decided by Judge Brown, in Rhode Island.

United States v. *Roth*, decided by Judge Knox, in New York.

United States v. *Taylor*, decided by Judge Sanford, in Tennessee.

United States v. *Blumenthal*, decided by Judge Bledsoe, in California.

United States v. *Diamond Shoe & Garment Co.*, decided by Judge Pritchard, in West Virginia.

United States v. *Paris*, decided by Judge Howe, in New York.

United States v. *Fabian*, decided by Judge Bourquin, in Montana.

United States v. *Russell*, decided by Judge Foster, in Louisiana.

Judge Westenhaver, in Ohio, has also held the Act constitutional in denying an injunction against its enforcement, and several other judges have sustained the act in charges to the grand jury.

On the other hand, the Act of October, 1919, has been held unconstitutional in the following reported cases:

United States v. *Cohen Grocery Co.*, decided by Judge Faris, in Missouri, 264 Fed. 218.

Detroit Creamery Co. v. *Kinnane*, 264 Fed. 845, decided by Judge Tuttle, in Michigan. Judge Tuttle also made the same ruling in two other cases.

In the case of *Tedrow* v. *Lewis*, which is now No. 357 on the docket of this court, Judge Lewis, in Colorado, held the Act unconstitutional. In *United States* v. *Armstrong*, Judge Anderson, in Indiana, held the Act unconstitutional upon the ground of arbitrary classification. Other unreported cases in which the Act was held unconstitutional are:

United States v. *People's Fuel Co.*, decided by Judge Dooling, in Arizona.

Lamborn v. *McAvoy*, decided by Judge Thompson, in Pennsylvania.

United States v. *Bernstein*, decided by by Judge Woodrough, in Nebraska.

Judge Evans, in Kentucky, and Judge Hutcheson, in Texas, ruled that the Act was unconstitutional in charges to the grand jury. In *Kennington* v. *Palmer et al.*, Judge Holmes, in Mississippi, without passing on the constitutional questions, declined to grant an injunction against the enforcement of the law. This case is now No. 367 on the docket of this court.

It will thus be seen that, with few exceptions, the lower courts have sustained the law.

VI.

The indictment is not open to the objection that it does not sufficiently give the defendant notice of the accusation, and is a good indictment unless it can be said that the Act upon which it is based is unconstitutional.

The objection is made that the indictment in this case fails to meet the constitutional requirement that, in criminal cases, an accused shall be informed of the nature and cause of the accusation. The indictment, however, specifically describes the transaction which, it is charged, constituted an offense. The first count, for instance, charges that the defendant, being a dealer in necessaries, sold to one B. Heligman 50 pounds of granulated sugar on or about the 3d day of December, 1919, for which a charge of $10.07 was made, and that this was an unjust and unreasonable rate and charge. The defendant's attention is unmistakably directed to a particular transaction. If he should ever be indicted for the same transaction, this indictment would, without difficulty, furnish the basis for a defense to a further prosecution. With attention thus directed to a specific transaction, it is charged that the price named was unjust and unreasonable. If it is competent for Congress to denounce as an offense an unreasonable and unjust act and leave it to the jury to determine from the evidence whether, as a fact, the transaction complained of is unjust and unreasonable, the indictment in this case gives to the defendant all the notice which the Constitution requires or which could prop-

erly be given. The real objection in this case is that the Act of Congress is itself too vague and uncertain to admit of enforcement. We therefore pass to a consideration of that question.

VII.

The Act of October, 1919, is not subject to the objection that it is too vague and uncertain.

The demurrer in this case states the objection to the Act of October, 1919, in this language:

> The section of the amended statute upon which the counts are based violates the Sixth Amendment to the Constitution, in that it affords a person no standard or criterion by which he can, or could determine, whether any act contemplated by him would be violative of the statute; it does not afford a standard or criterion in conformity to which an indictment based upon the section will, or can, advise one accused under the section of the nature and cause of the accusation against him; it contains and provides no definition of terms employed so that it can be determined whether an act alleged to have been done is such an act as the section prohibits; it leaves to the determination of courts and juries what the Congress alone can determine within any lawful limitations, conditions, or circumstances. (Rec., pp. 5-6.)

The question is whether Congress may declare it to be a criminal offense to charge an unreasonable price for necessaries, leaving it to a jury to determine, from all the facts and circumstances, whether a particular

charge is reasonable or unreasonable, or whether it is necessary for the Act itself to provide a more definite standard by which the jury must be governed.

If the reasonableness of a rate or charge can be said to be a fact, then undoubtedly it may be left to the determination of the jury under the circumstances disclosed by the evidence.

The rule which has been invoked against this statute was stated in *United States* v. *Brewer* (139 U. S., 278, 288) as follows:

> Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid.

And again:

> Before a man can be punished, his case must be plainly and unmistakably within the statute.

There is no occasion to question the soundness of this rule. The only difficulty is with its application to particular cases. Undoubtedly a statute creating an offense must use language which will convey to the average mind information as to the act or fact which it is intended to make criminal. But statutes describing crimes must necessarily be more or less general in their terms. It is impossible to fix rules of conduct to cover every circumstance or condition that may arise. It is perhaps equally impossible to so frame a statute that all men will agree as to just what circumstances will or will not constitute the crime denounced. There are certain standards both of law and of fact which may be assumed in enacting legislation. When these standards are invoked, a

question of fact is presented for the jury to determine under the particular facts of each case, and it is no objection to the statute that it is necessary to invoke these external standards. Thus, in *Miller* v. *Strahl* (239 U. S., 426, 434) it was said:

> Rules of conduct must necessarily be expressed in general terms and depend for their application upon circumstances, and circumstances vary. It may be true, as counsel says, that "men are differently constituted," some being "abject cowards and few only are real heroes"; that the brains of some people work "rapidly and normally in the face of danger while other people lose all control over their actions." It is manifest that rules could not be prescribed to meet these varying qualities. Yet all must be brought to judgment. And what better test could be devised than the doing of "all in one's power" as determined by the circumstances?

To determine from the evidence in a given case what is reasonable or unreasonable is to perform exactly the same function which a jury performs when the question of negligence is submitted to it.

That the language used in this statute is not so general and uncertain as to be subject to constitutional objections would seem now to be definitely settled by recent rulings of this court. In the case of *Waters-Pierce Oil Co.* v. *State of Texas* (No. 1) (212 U. S. 86), the court had under consideration a statute of the State of Texas which denounced contracts and arrangements "reasonably calculated"

to fix and regulate the price of commodities and which "tend" to accomplish the prohibited results. It was insisted that these laws were so indefinite that no one can tell what acts are embraced within their provision. It was argued that laws of this nature ought to be so explicit that all persons subject to their penalties may know what they can do and what it is their duty to avoid. The case of *Tozer* v. *United States* (52 Fed. 917), in which Mr. Justice Brewer, then Judge of the Circuit Court, held that the criminality of an act can not depend upon whether a jury can think it reasonable or unreasonable was cited. It was held, however, that the Texas statutes did not give the broad power to a court or jury to determine the criminal character of the act in accordance with their belief as to whether it is reasonable or unreasonable. The court said (p. 110):

> As to the phrase, "reasonably calculated," what does it include less than acts which, when fairly considered, tend to accomplish the prohibited thing, or which make it highly probable that the given result will be accomplished?

All questions which could be said to be left open by the opinion just referred to were, however, put completely at rest by what this court said in *Nash* v. *United States* (229 U. S. 373). That case was a prosecution under the criminal features of the Sherman Antitrust Act. The court had previously held that, in order to be prohibited, contracts and combinations must *unduly* restrict competition or *unduly*

obstruct the course of trade. At once the contention was made in the *Nash* case that, since only *undue* restricting of competition and *undue* obstructing of the course of trade were prohibited, the criminal features of the Act could not be enforced for the same reasons now denounced against the Lever Act. It was said that the crime thus defined contains, in its definition, an element of degree as to which estimates may differ, with the result that a man might find himself in prison because his honest judgment did not coincide with that of a jury of less competent men. The court, however, said, at page 377:

> But apart from the common law as to restraint of trade thus taken up by the statute, the law is full of instances where a man's fate depends on his estimating rightly—that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death. "An act causing death may be murder, manslaughter, or misadventure, according to the degree of danger attending it" by common experience in the circumstances known to the actor. "The very meaning of the fiction of implied malice in such cases at common law was that a man might have to answer with his life for consequences which he neither intended nor foresaw." (*Commonwealth* v. *Pierce*, 138 Massachusetts, 165, 178; *Commonwealth* v. *Chance*, 174 Massachusetts, 245, 252.) "The criterion in such cases is to examine whether common social duty would,

under the circumstances, have suggested a more circumspect conduct." (1 East P. C. 262.) If a man should kill another by driving an automobile furiously into a crowd, he might be convicted of murder, however little he expected the result. (See *Reg.* v. *Desmond* and other illustrations in Stephen, Dig. Crim. Law, art. 223, 1st ed., p. 146.) If he did no more than drive negligently through a street, he might get off with manslaughter or less. (*Reg.* v. *Swindall*, 2 C. & K. 230; *Rex* v. *Burton*, 1 Strange, 481.) And in the last case he might be held although he himself thought that he was acting as a prudent man should. (See *The Germanic*, 196 U. S. 589, 596.) But without further argument, the case is very nearly disposed of by *Waters-Pierce Oil Co.* v. *Texas* (No. 1) (212 U. S. 86, 109), where Mr. Justice Brewer's decision and other similar ones were cited in vain. We are of opinion that there is no constitutional difficulty in the way of enforcing the criminal part of the act.

If, therefore, it can constitutionally be left to the jury to determine, from the facts and circumstances of a particular case, whether a given contract or combination *unduly* restricts competition or restrains trade, it is difficult to see any principle upon which it can be denied that the same jury may be left to determine, from a given state of facts and circumstances, whether a particular price demanded for necessaries is reasonable or unreasonable. Later cases have emphasized the rule laid down in the *Nash* case. In *Omacchevarria* v. *Idaho* (246 U. S.

343), the court had before it a statute of Idaho prohibiting any person having charge of sheep to permit or suffer them "to be herded, grazed or pastured on any cattle range previously occupied by cattle, or upon any range usually occupied by any cattle grower, either as a spring, summer or winter range for his cattle." The court said, at page 348:

> It is also urged that the Idaho statute, being a criminal one, is so indefinite in its terms as to violate the guarantee by the Fourteenth Amendment of due process of law, since it fails to provide for the ascertainment of the boundaries of a "range" or for determining what length of time is necessary to constitute a prior occupation a "usual" one within the meaning of the act. Men familiar with range conditions and desirous of observing the law will have little difficulty in determining what is prohibited by it. Similar expressions are common in the criminal statutes of other States. This statute presents no greater uncertainty or difficulty, in application to necessarily varying facts, than has been repeatedly sanctioned by this court. (*Nash* v. *United States*, 229 U. S. 373, 377; *Miller* v. *Strahl*, 239 U. S. 426, 434) Furthermore, any danger to sheepmen which might otherwise arise from indefiniteness, is removed by Section 6314 of Revised Codes, which provides that: "In every crime or public offense there must exist a union, or joint operation, of act and intent, or criminal negligence."

And still later, in *Arizona Employers' Liability Cases* (250 U. S. 400, 432), it was said:

> There are cases in which even the criminal law requires a man to know facts at his peril. Indeed, the criterion which is thought to be free from constitutional objection, the criterion of fault, is the application of an external standard, the conduct of a prudent man in the known circumstances; that is, in doubtful cases, the opinion of the jury, which the defendant has to satisfy at his peril and which he may miss after giving the matter his best thought.

The case of *International Harvester Co.* v. *Kentucky* (234 U. S. 216), will be cited as authority for a contrary rule. In deciding that case, however, the court took pains to show that it was not in conflict with the *Nash* case, and an examination of it makes clear the distinction between the two cases. In the *International Harvester Company* case the Kentucky court had held that the law, in effect, made lawful a combination for the purpose of controlling prices unless for the purpose or with the effect of fixing a price that was greater or less than the *real value* of the article, and that by its real value was meant "its market value under fair competition, and under normal market conditions." The objection which this court found to the statute was that this definition of real value was one which it was practically impossible to apply, for the reason that it did not relate to existing facts, but to facts which might have existed but for

conditions which already existed. Mr. Justice Holmes said, at page 222:

> Value is the effect in exchange of the relative social desire for compared objects expressed in terms of a common denominator. It is a fact and generally is more or less easy to ascertain. But what it would be with such increase of a never extinguished competition as it might be guessed would have existed had the combination not been made, with exclusion of the actual effect of other abnormal influences, and, it would seem with exclusion also of any increased efficiency in the machines but with inclusion of the effect of the combination so far as it was economically beneficial to itself and the community, is a problem that no human ingenuity could solve. The reason is not the general uncertainties of a jury trial but that the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect to the acutest commercial mind. The very community, the intensity of whose wish relatively to its other competing desires determines the price that it would give, has to be supposed differently organized and subject to other influences than those under which it acts. It is easy to put simple cases; but the one before us is at least as complex as we have supposed, and the law must be judged by it. In our opinion it can not stand.

And proceeding to distinguish the case from the *Nash* case, he added:

> We regard this decision as consistent with *Nash* v. *United States* (229 U. S. 373, 377), in

> which it was held that a criminal law is not unconstitutional merely because it throws upon men the risk of rightly estimating a matter of degree—what is an undue restraint of trade. That deals with the actual, not with an imaginary condition other than the facts. It goes no further than to recognize that, as with negligence, between the two extremes of the obviously illegal and the plainly lawful there is a gradual approach and that the complexity of life makes it impossible to draw a line in advance without an artificial simplification that would be unjust. The conditions are as permanent as anything human, and a great body of precedents on the civil side coupled with familiar practice make it comparatively easy for common sense to keep to what is safe. But if business is to go on, men must unite to do it and must sell their wares. To compel them to guess on peril of indictment what the community would have given for them if the continually changing conditions were other than they are, to an uncertain extent; to divine prophetically what the reaction of only partially determinate facts would be upon the imaginations and desires of purchasers, is to exact gifts that mankind does not possess.

In other words, it is held that while it is competent to leave the jury to determine what is an undue restriction of commerce under existing circumstances, it is not competent to make the guilt or innocence of a man depend upon what guess the jury may make as to what conditions would be if the conditions actually existing did not exist. So, it might not be

competent to make the guilt or innocence of one charged with making unreasonable prices during the war depend upon what the jury might think would have been reasonable prices if there had been no war.

The application of a rule in the *Nash* case to the laws now under consideration has been admirably stated by several of the district judges who have passed on this question. Thus, in *United States* v. *Rosenblum* (264 Fed. 578, 582), it was said:

> Obviously, it would be impossible for Congress to fix any definite standard, any fixed rate, as the measure for determining an unjust or unreasonable rate or charge. This because profits must always depend upon a number of varying elements, including time, place, and circumstance. A fixed standard in practical operation would necessarily prove unjust and unreasonable in the extreme. The words used by Congress were of common use and of well-known meaning. The merchant in passing upon the question of what is an unjust and unreasonable rate or charge deals with the actual, not with an imaginary condition other than the facts. Since, as the Supreme Court has said, "between the two extremes of the obviously illegal and the plainly lawful there is a gradual approach and that the complexity of life makes it impossible to draw a line in advance without an artificial simplification that would be unjust," the only alternative, if profiteering is to be lawfully condemned, was to place the responsibility upon the dealer. If in doubt, he should keep on the safe side. If for greater gain he takes the risk of violating

the statute, he can not complain if the jury denounces his act as unlawful.

In *United States* v. *Oglesby Grocery Co. et al.* (264 Fed. 691, 695) Judge Sibley said:

> Evidently standards may exist in law or fact to which the Legislature may refer, and the existence of them is a matter of importance. It must be noted that the act of August 10, 1917, is dealing with necessaries; articles that, by reason of their necessity, are in common use, dealt in continuously and everywhere. The range of prices and profits in them in time of peace is well established and well understood. The changes that occur in such prices, and the causes therefor, are well known. The dealer is not in a novel venture. The descriptive words of the act are thus defined by Webster:
>
> Unjust, as "contrary to justice and right; wrongful." Excessive, as "exceeding what is usual and proper." Unreasonable, as "beyond the limits of reason or moderation; immoderate; exorbitant." Immoderate, in turn, means "exceeding just, usual or suitable bounds." Exorbitant means "deviating from the normal or customary course; going beyond the rule or established limits of right or propriety."
>
> The words used by Congress in reference to a well-established course of business fairly indicate the usual and established scale of charges and prices in peace times as a basis, coupled with some flexibility in view of changing conditions. The statute may be construed to forbid, in time of war, any de-

parture from the usual and established scale of charges and prices in time of peace, which is not justified by some special circumstance of the commodity or dealer. Evidently increased costs of production and transportation would justify a corresponding increase in price, and necessarily increased expenses in the conduct of business would justify an increased charge for handling; but the existence and sufficiency of the justification is left, in each case, to the courts. This does not differ, in substance, from the situation arising under the Georgia homicide statutes which forbid generally the killing of a human being, but admit of justifications and mitigations which are measured finally by the opinion of juries. The dealer knows what was, in time of peace, usual and customary. Within that limit he is safe. He judges of the justification for departure from it at his own risk. That the usual and customary may serve as defining a crime was ruled in *Omaechevarria* v. *Idaho* (246 U. S. 343; 38 Sup. Ct. 323; 62 L. Ed. 763).

VIII.

The principle discussed above, as applied to this case, is not a new departure, but has consistently been applied to numerous criminal laws.

This statute is no more uncertain in its terms and leaves no more to the determination of the jury than numerous statutes which are daily enforced in the criminal courts throughout the United States. In the *Nash* case, *supra*, certain Massachusetts cases were referred to approvingly. In these cases, the

rule, which applies everywhere, was applied—that is, of what degree of homicide a man may be guilty, or whether the homicide be justifiable, depends, at last, upon the judgment of the jury as to whether, under all the circumstances, the act which results in death was justifiable. A person taking the life of another may have honestly believed that the act which he did was necessary to save his own life, but the test everywhere is whether this belief was entertained upon reasonable grounds, or upon grounds which would control the belief of a reasonable man. Thus, constantly with a man's life at stake, juries are called upon to determine whether more force has been used than was reasonably necessary under the circumstances, and whether, under given circumstances, a reasonable man would be justified in believing that his life was in danger. In all such cases a man may not know when he kills another whether he is committing murder or justifiable homicide any more certainly than a merchant selling necessaries can know whether he is charging a reasonable or unreasonable price. In both cases he may be honest but mistaken. If the Constitution does not protect him from being punished in the one case, it certainly does not protect him in the other. In *United States* v. *Oglesby Grocery Co.* (264 Fed. 691, 693–694), Judge Sibley has very strongly presented this phase of the case as follows:

> Every code of criminal laws contains many vague definitions of crime. There are none

but statutory offenses in Georgia. Many of the standards set up by her Penal Code use the very term "reasonable" or others as loose, of the application of which the jury must judge, and these statutes are daily upheld and enforced. Section 40 forbids conviction generally, where "it satisfactorily appears there was no evil design, or intention, or *culpable neglect*." In the law of homicide, section 65 declares:

"For if there should have been an interval between the assault or provocation given and the homicide, *of which the jury in all cases shall be the judges, sufficient* for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge, and be punished as murder."

In dealing with homicide justified by fear of felony about to be committed on person or habitation, section 71 declares "it must appear that the circumstances were sufficient to excite the fears of a reasonable man," an ideal perfectly known only to juries. And section 75 says of justification:

"All other instances which stand upon the *same footing of reason and justice* as those enumerated shall be justifiable homicide."

By section 103 "opprobrious words, or abusive language," may be shown in a case of assault and battery, "which may or may not amount to a justification, according to the nature and extent of the battery, *all of which shall be determined by the jury*." Section 922, dealing with arrests without warrant, requires

a warrant to be seasonably secured, and declares, "and no such imprisonment shall be legal beyond a *reasonable time*, allowed for this purpose," on pain of criminal punishment under section 106. By section 117 a railway employee "guilty *of negligence*, either by omission of duty or by any act of commission, in relation to the matters entrusted to him, or about which he is employed, from which negligence serious bodily injury * * * occurs," is guilty of a felony. Section 704 makes criminal any person who acquires any money "by *any fraud or ill practice*, in playing at any game," and section 719 "any person using *any deceitful means or artful practice*, other than those which are mentioned in this Code, by which an individual, or a firm, or a corporation, or the public is defrauded and cheated." Section 381 makes criminal open lewdness, or any notorious act of *public indecency tending to debauch the morals*. Section 383, the keeping of a "*common, ill-governed and disorderly* house, to the encouragement of idleness," etc. Sections 385 and 386 deal with pictures and writings described as "obscene and indecent or *tending to debauch the* morals," and 387 makes criminal the use of "*obscene and vulgar or profane* language" in the presence of a female, and "*indecent or disorderly conduct* in the presence of females on passenger cars, street cars, or other places of like character." Similar descriptions of crime are found in the Federal Penal Code, sections 102, 211, and 212 (Comp. St. sections 10271, 10381, 10382).

> It is evident that the standards of decency and propriety change with time and place. Under none of these statutes can a man know with certainty how his conduct will be judged by others.

The statutes referred to in this opinion are fairly illustrative of the criminal statutes on the books of practically every State in the Union. There are statutes which punish criminal negligence, and numerous other laws under which an individual and the jury which afterwards tries him may honestly differ as to whether a particular act is a crime or not. The great bulk of the criminal laws of the various States of the Union are as much subject as the law now under consideration to the objection which is urged against it. In view of the recent decisions of this court, which have been quoted above, the question would now scarcely seem to be an open one.

IX.

The exclusion of farmers and other producers from the inhibition of the statute which applies to dealers does not constitute an arbitrary classification.

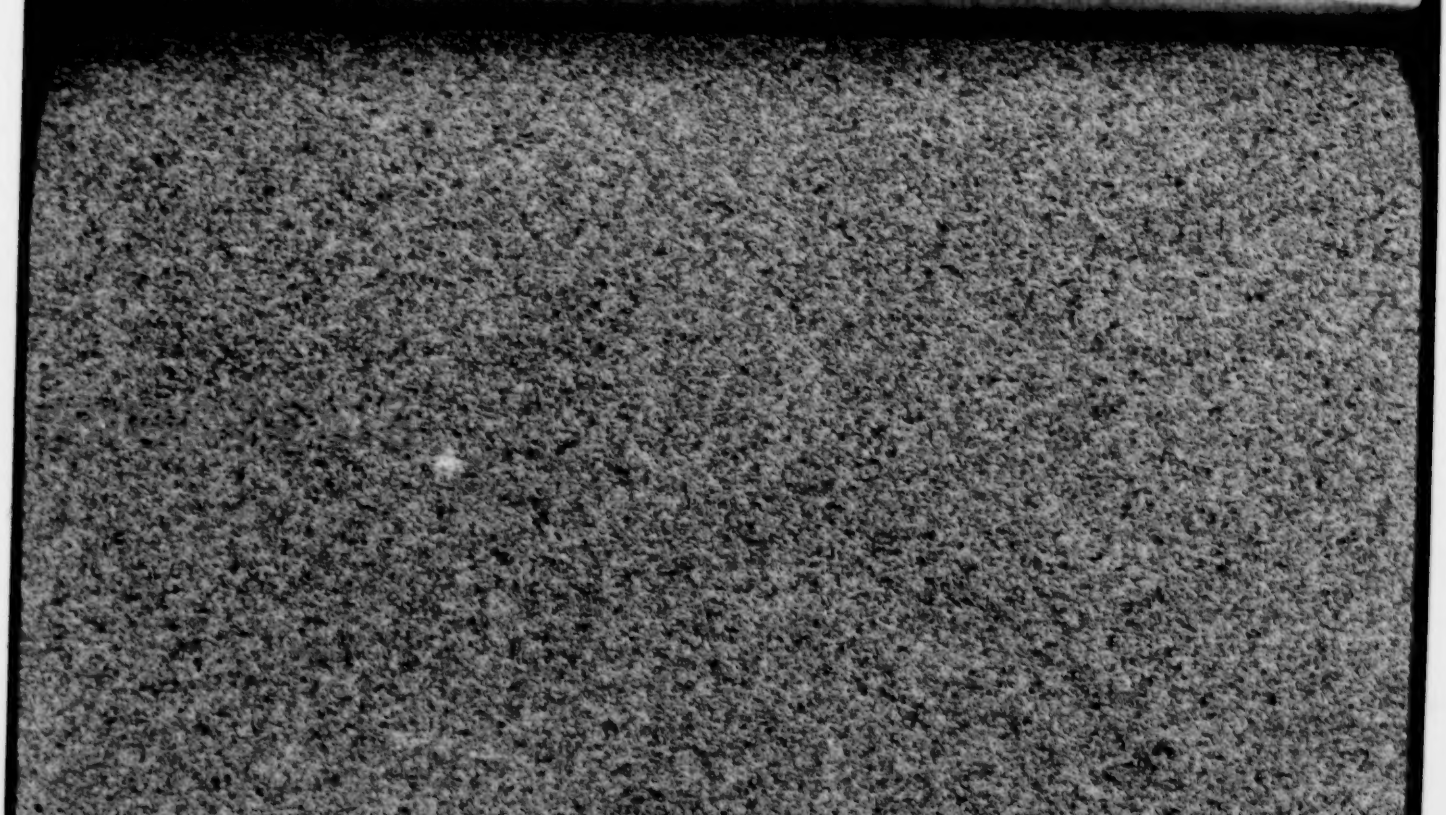
The demurrer in this case does not raise this question. It is raised, however, in the case of *Harry B. Tedrow* v. *A. T. Lewis & Sons, et al.*, No. 357 on the docket of this court, which is to be heard immediately following this case. The Government's contention as to the question of classification will be fully presented in its brief in that case, to which reference is now made.

CONCLUSION.

It is respectfully submitted that the judgment of the District Court is erroneous and should be reversed.

WILLIAM L. FRIERSON,
Solicitor General.

SEPTEMBER, 1920.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1920.

No. 324.

THE UNITED STATES OF AMERICA,
Plaintiff In Error,

v.

L. COHEN GROCER COMPANY,
Defendant In Error.

STATEMENT OF THE CASE, BRIEF AND ARGUMENT OF THE DEFENDANT IN ERROR.

CHESTER H. KRUM,
LOUIS B. SHER,
For Defendant in Error.

A. B. STEELE & CO., 10 S. THIRD ST., ST. LOUIS

SUBJECT INDEX.

Statement of the Case.

Points and Brief.

Instant Case.

Argument.

CASES REFERRED TO.

As to Powers of Congress.

As to Violation of Amendment V.

As to Violation of Amendment VI.

Views District Judges, on Point.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1920.

No. 324.

THE UNITED STATES OF AMERICA,
Plaintiff In Error,

v.

L. COHEN GROCER COMPANY,
Defendant In Error.

STATEMENT OF THE CASE.

The defendant in error, a corporation, organized under the laws of the State of Missouri, was at the September term of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri indicted upon two counts as follows:

United States of America,
Eastern Division of the Eastern } ss:
Judicial District of Missouri,

In the District Court of the United States, within and for the Eastern Division of the Eastern Judicial District of Missouri, at the September term thereof, A. D. 1919.

The grand jurors for the United States of America, duly empaneled, sworn and charged in and for the District Court of the United States, for the Eastern Division of the Eastern Judicial District of Missouri, at the September term thereof, A. D. 1919, and inquiring in and for said division of said district, upon their oaths present and charge:

That on or about the 3d day of December, A. D. 1919, and at all times herein mentioned, while a state of war existed between the United States of America and the German Government, the L. Cohen Grocery Company was a corporation duly organized and existing under the laws of the State of Missouri, with its main office and principal place of business located at or in the immediate vicinity of 1014 North Seventh street, in the City of St. Louis and State of Missouri; that the said L. Cohen Grocery Company then, and at all times herein mentioned, **was a dealer in sugar and other necessaries**, and on or about said 3d day of December, A. D. 1919, at said City of St. Louis, in the State of Missouri, and within the division and district aforesaid, and within the jurisdiction of the court aforesaid, did **wilfully and feloniously make an unjust and unreasonable rate and charge in handling and dealing in a certain necessary, to-wit, sugar**, in this, to-wit:

That it, the said L. Cohen Grocery Company, not then and there being a farmer, gardener, horticulturist, vineyardist, planter, ranchman, dairyman, stockman, or other agriculturist engaged in dealing in farm products produced or raised upon any land owned, leased, or cultivated by it, on or about the said 3d day of December, A. D. 1919, at the City of St. Louis, in the State of Missouri, and within the division and district aforesaid, and within the jurisdiction of the court

aforesaid, being engaged as a dealer in the necessary as aforesaid, did wilfully and feloniously demand of, and exact and collect from and of one B. Heligman, whose given name is to the grand jurors unknown and can not, therefore, be herein set our, the sum of ten dollars and seven cents ($10.07), as and for the purchase price of about fifty (50) pounds of granulated sugar then and there purchased by the said B. Heligman from the said L. Cohen Grocery Company, which said purchase price so demanded, exacted, and collected for the said granulated sugar by the said L. Cohen Grocery Company from the said B. Heligman was and constituted an unjust and unreasonable rate and charge as it, the said L. Cohen Grocery Company, then and there well knew.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

Second Count.

And the grand jurors aforesaid, on their oaths aforesaid, do further present and charge:

That on or about the 4th day of December, A. D. 1919, and at all times herein mentioned, while a state of war existed between the United States of America and the German Government, the L. Cohen Grocery Company was a corporation duly organized and existing under the laws of the State of Missouri, with its main office and principal place of business located at or in the immediate vicinity of 1014 North Seventh street, in the City of St. Louis and State of Missouri; that the said L. Cohen Grocery Company then, and at all times herein mentioned, was a dealer in sugar and

other necessaries, and on or about said 4th day of December, A. D. 1919, at said City of St. Louis, in the State of Missouri, and within the division and district aforesaid, and within the jurisdiction of the court aforesaid, **did wilfully and feloniously make an unjust and unreasonable rate and charge in handling and dealing in a certain necessary, to-wit, sugar,** in this, to wit:

That it, the said L. Cohen Grocery Company, not then and there being a farmer, gardener, horticulturist, vineyardist, planter, ranchman, dairyman, stockman, or other agriculturist engaged in dealing in farm products produced or raised upon any land owned, leased, or cultivated by it, on or about the said 4th day of December, A. D. 1919, at the City of St. Louis, in the State of Missouri, and within the division and district aforesaid, and within the jurisdiction of the court aforesaid, being **engaged as a dealer in the necessary as aforesaid**, did **wilfully and feloniously demand of, and exact and collect from and of one B. Heligman**, whose given name is to the grand jurors unknown and cannot, therefore, be herein and set out, **the sum of nineteen dollars and fifty cents** ($19.50), as and **for the purchase price of one bag of granulated sugar**, containing in the aggregate approximately one hundred (100) pounds, **then and there purchased by the said B. Heligman from the said L. Cohen Grocery Company**, which said purchase price so demanded, exacted, and collected for the said granulated sugar by the said L. Cohen Grocery Company from the said B. Heligman was and constituted an unjust and unreasonable rate and charge as it, the said L. Cohen Grocery Company, then and there well knew.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

Vance J. Higgs,
Special Assistant to the Attorney General.

To this indictment, the defendant in error demurred as follows:

In the District Court of the United States for the Eastern Division, Eastern District of Missouri.

The United States of America,
Plaintiff.
v.
The L. Cohen Grocer Company,
Defendant.
No. 7283.

Now and hereby entering its appearance to the above entitled indictment, the defendant, the L. Cohen Grocer Company demurs to the indictment and each count thereof and says, that they are insufficient in law and that the defendant should not be required to answer to or defend against them for the following reasons:

1. Neither count states facts sufficient to constitute an offense.

2. Neither count sufficiently, or in any manner advises the defendant of the nature and cause of the accusation against the defendant; neither count states facts which will enable the defendant to properly prepare for trial, or advises the defendant of what it will be required to meet at such trial, and neither

count states such facts as, in the event of a conviction or acquittal, will enable the defendant to plead the result in bar to a subsequent indictment for the same offense.

3. Each count of the indictment is violative of the Constitution of the United States, in this, to-wit:

1. Congress having declared the object of the statute to be the furtherance and success of the military and naval operations of the United States in war against the German Imperial Government, and on October 22, 1919, when the penal clause on which the counts are based was enacted, the necessity for such enactment, having passed because of the actual cessation of military and naval operations by the United States in such war, the Congress was without authority or power to enact such penal clause. As enacted, it was and is an invasion of the rights of the States.

2. The section of the amended statute upon which the counts are based violates the sixth amendment to the Constitution, in that it affords a person no standard or criterion by which he can, or could determine whether any act contemplated by him would be violative of the statute; it does not afford a standard, or criterion in conformity to which an indictment based upon the section will, or can advise one, accused under the section, of the nature and cause of the accusation against him; it contains and provides no definition of terms employed so that it can be determined whether an act alleged to have been done is such an act as the section prohibits; it leaves to the determination of courts and juries what the Congress alone can determine within any lawful limitations, conditions, or circumstances.

Wherefore the defendant prays judgment, that the said indictment and each count thereof, may be for naught held and the defendant be hence discharged.

Chester H. Krum,
Louis B. Sher,
For Said Defendant.

Upon submission to the Court this demurrer was sustained, the Honorable C. B. Faris, District Judge filing in connection with his sustaining the demurrer the following memorandum, or opinion showing the ground upon which the demurrer was sustained.

In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

United States of America,
Plaintiff,
v.
L. Cohen Grocer Company,
Defendant.
No. 7283.

Memorandum of Court on Demurrer to Indictment.

The defendant, a corporation under the laws of the State of Missouri, stands indicted in this court in two counts under the amendment of October 22, 1919, of the Act of August 10, 1917. To this indictment, and to both of the counts thereof, defendant demurs for that both the indictment, which follows the language of the amendment, *supra*, and the amendment itself, are insufficient to inform it of the nature and cause of the accusation against it; and, therefore, that both such indictment and the amendment itself, are viola-

tive of the sixth amendment to the Constitution of the United States.

The language of the statute which attempts to create the crime charged against defendant, so far as that language is pertinent to the specific charge against this defendant, reads thus:

> "That it is hereby made unlawful for any person wilfully to make any unjust or unreasonable rate or charge in handling or dealing in necessities. * * * Any person violating any of the provisions of this section upon conviction thereof shall be fined not exceeding five thousand dollars and be imprisoned for not more than two years or both." (Sec. 2, Chap. 80, Stat. 1919, amendment of October 22, 1919, to the Lever Act.)

Following the language of the above statute the indictment charges that defendant "did wilfully and feloniously make an unjust and unreasonable rate and charge in handling and dealing in a certain necessary, to-wit, sugar;" and thereupon the indictment proceeds to aver the facts of the alleged sale of sugar, in that it sets forth the date of the purchase, the name of the purchaser to whom said sugar was sold by defendant, the amount of sugar sold, and the price charged such purchaser therefor, and concludes by averring "that said purchase price so demanded exacted and collected for the said granulated sugar by the said L. Cohen Grocer Company from the said R. Heilmann, was and constituted an unjust and unreasonable rate and charge, as it the said L. Cohen Grocer Company then and there well knew."

Shortly before this, in a trial in this court upon a similar indictment against this defendant, at th

clusive of the case, and upon a demurrer *ore tenus*, bottomed upon the alleged insufficiency of the evidence to convict, I took occasion in an oral charge to say to the jury this:

"The act under which this prosecution is being had was approved on the 22nd day of October, 1919, more than eleven months after the signing of the armistice. It is, of course, fundamental, gentlemen, that the constitutional validity of this act depends wholly upon whether, at the time it was passed and approved, a state of war existed between the United States of America and the Imperial German Government. Clearly, in a time of peace, a statute like this could not stand under the Constitution of the United States for a single minute.

"The Federal Constitution is not a limitation upon the powers of Congress, but it is a grant of powers to Congress, and beyond the limits of that grant neither Congress nor any other coordinate branch of the Government had a right to go. Congress has no power to do anything unless power to act, either expressly or impliedly, is conferred by the terms of the organic law itself.

"So, in times of peace, the power to pass a statute like this is to be determined by the question whether the statute falls within the domain of interstate commerce, or within the domain of internal revenue. It must be within the domain of one or the other, or Congress has no power to invade the State's rights and pass it. Very clearly, this statute is not a manifestation of the power of legislation on matters of internal revenue. Just as clearly, in my opinion, or almost as clearly, at least, it is not a matter within the domain of interstate commerce. This is so because this act deals with the commodities that are affected by it after interstate commerce has

wholly ceased to deal with these commodities; after, in other words, interstate commerce has acted and the commodity has come to rest in the State—in this case, in the State of Missouri.

"But since the Supreme Court of the United States in the liquor case has seemingly ruled that a legal state of war, or a legal fiction of war, exists and will continue to exist until the ratification of the treaty of peace with the German Republic, and until the proclamation of that fact by the President, although the Imperial German Government with which the war was declared has ceased to be, I am therefore, bound by this ruling. Consequently, whatever mental reservations I may hold personally I take it that so far as that particular phase of the Constitution is concerned, that the act in question is valid.

"But a most serious question is met after the constitutionality of the statute is settled, upon the point of its invasion of State's rights, the point that I have just been talking about. That question is, whether the act is not too vague, indefinite, and uncertain to be enforced by the courts, and whether by reason of such vagueness, indefiniteness, and uncertainty it does not, in effect, delegate the legislative power which is vested in Congress alone to the courts and to the juries of this country; and, also, whether this act by its existing terms fixes any definite or certain rule by which human conduct can be uniformly governed. In other words, the question arises—a serious question arises: Does it inform the accused of the nature and cause of the accusation against him, as the sixth amendment to the Constitution of the United States specifically and certainly requires? I can not be brought to think so, gentlemen.

"Briefly: This statute makes it a felony for any person—which, I take it, includes a corporation as well—wilfully to make any unjust or

unreasonable charge in dealing in any necessary. It nowhere defines what is unjust or what shall be deemed unreasonable. It leaves it to the jury to find what particular thing it is that the law has made a felony of. One jury might very well say that a profit or charge of one cent a pound on sugar, above cost and carriage, is unjust and unreasonable, and so a felonious act; while another jury might say that a charge of twenty-five cents was not unjust and unreasonable. No criminal statute, gentlemen, ought to be so vague and uncertain as that the citizen cannot at any given moment know whether he is a felon or a patriot.

"In the presence of the existing rapacity and greed of the profiteer, I confess it has been difficult for me to approach this question in a judicial frame of mind. It is to me a matter of most sincere regret that I find it my duty to say, so far as the application of this law to the fact presented in this identical case is concerned, that it is invalid, for the reason I have stated. It is regrettable that a law which was intended to be as beneficent as this law is intended to be, and which was intended and designed to remedy a most outrageous and crying evil, should be found to fall short by reason of constitutional difficulties of the end sought to be attained. There never was a time when a curb of human greed and rapacity was so urgently demanded as it is demanded now, and I repeat, that the abhorrence I feel of the selfish hoggishness of the profiteer is such that I can scarcely deal with the question with the amount of judicial aplomb with which I ought to deal with it.

"But, in my opinion, gentlemen, these considerations do not warrant ruthless overriding of the rights of the citizen to have stated in a criminal statute the certain and definite rights which hedge him about as a citizen, and the certain and

definite definition by which he or his counsel, can ascertain whether or not he is guilty of a felony.

"Congress alone has power to define crimes against the United States. This power cannot be delegated to the courts or to the juries of this country. * * *

"Therefore, because the law is vague, indefinite, and uncertain, and because it fixes no immutable standard of guilt, but leaves such standard to the variant views of the different courts and juries which may be called on to enforce it, and because it does not inform defendant of the nature and cause of the accusation against him, I think it is constitutionally invalid, and that the demurrer offered by the defendant ought to be sustained."

To these views thus orally expressed, I am constrained to adhere, notwithstanding the fact that my attention has been called to certain cases which, it is urged, give color to the contention that statutes equally as vague, uncertain, and indefinite as that here involved have nevertheless been upheld by the Supreme Court of the United States as constitutionally valid. These cases are **Standard Oil Company** v. **United States,** 221 U. S. 106; **Nash v. U. S.,** 229 U. S. 273; and **Waters-Pierce Oil Company v. Texas,** 212 U. S. 86.

The case of **Standard Oil Company v. United States,** *supra*, was a civil proceeding by injunction and for dissolution into its constituent elements for monopolization and restraint of trade, and it was not a criminal proceeding, such as is this at bar. The statute upheld in the Standard Oil case upon an attack analogous to this (or so far analogous as a civil case may

be to a criminal one) were sections 1 and 2, of the so-called Sherman Anti-Trust Act. (Sections 1 and 2 act of July 2, 1890, Chap. 647, 26 Stat. 209). These sections denounced and declared unlawful all monopolies and combinations and conspiracies in restraint of trade. Aiding the view taken in the above case by the Supreme Court of the United States, reliance to a large extent was had upon the ancient common law definitions and crimes of engrossing, and monopolizing. Since the above case was not a criminal one but a civil action, no occasion arose therein for any reference to or consideration by either court or counsel of the provisions of the sixth amendment to the Federal Constitution and none such was made.

Neither was the case of **Waters-Pierce Oil Company v. Texas,** *supra,* a criminal case, but a civil case in the nature of quo warranto. The trial thereof in the Texas State courts was had under certain statutes of that State, which provided as punishment for the violation thereof ouster and the assessment of certain penalties. Not the sixth amendment but that phrase of the fourteenth amendment touching due process of law was alone involved. (Waters-Pierce Oil Co. v. Texas, *supra, l. c.* 11). While the attack involved the alleged vagueness and indefiniteness of the Texas Statutes, these statutes clearly defined a monopoly. (Waters-Pierce Oil Co. v. Texas, *supra, l. c.* 99). For the rest, what is said touching the Standard Oil case, *supra,* applies also to the Waters-Pierce case.

The case of **Nash v. United States,** *supra,* was, however, a criminal case under sections 1 and 2, of the Sherman Anti-trust Act. The indictment in the Nash case was in two counts, one of which charged a conspiracy in restraint of trade, and the other a conspir-

acy to monopolize. It may or may not be a suggestive feature that there was originally also a third count which charged Nash with monopolization. This count was held to be bad on demurrer below and thereafter fell out of the case.

In the course of the opinion in the Nash case it was pointed out that no overt act, nothing, indeed, beyond the bare conspiracy itself, need be either charged or proven; that the Sherman Anti-trust Act punishes the conspiracies at which it is leveled on the common-law footing, and therefore does not make the doing of any act other than the act of conspiracy itself a condition of liability. Thus the Supreme Court justified the statutory crimes and conspiracies to monopolize, and conspiracies in restraint of trade, which are denounced by the Sherman Act by a relegation for their constituent elements back to the common-law definitions of the crimes of engrossing, monopolies and contracts in restraint of trade. (3 Coke Inst. 181, Chap. 85; 1 Hawkins P. C., Chap. 29; 5 and 6 Edw. VI, Chap. 14; Standard Oil Co. v. United States, 221 U. S., *l. c.* 51). Just here the query may logically arise as to where at common law is there any crime defined or denounced as "making an unjust or unreasonable charge in dealing in any necessity?"

After the Nash case was ruled, the Supreme Court of the United States again had occasion to refer to it and distinguish it in a case arising under the constitution and laws of the State of Kentucky. (International Harvester Co. v. Kentucky, 234 U. S. 216). Plaintiff in error in the above case was convicted and fined in the courts of the State of Kentucky under certain statutes passed pursuant to provisions

of the Kentucky constitution, which permitted the legislature to enact such laws as might be necessary to prevent all trusts "from combining to depreciate below its real value any article, or to enhance the cost of any article above its real value." The statutes passed by the Legislature of Kentucky made it lawful to enter into any combination for the purpose of controlling prices, "unless for the purpose or with the effect of fixing a price that was greater or less than the real value of the article." The Supreme Court of the United States held that neither the constitution of Kentucky nor the statutes above referred to, and passed pursuant to the constitution, offered any standard of conduct that it is possible to know in advance and comply with, and that such provisions, as a consequence, were invalid. **(International Harvester Co. v. Kentucky,** 234 U. S. 223).

Distinguishing the Nash case from what was said in the International Harvester case, the Supreme Court said:

> "We regard this decision as consistent with Nash v. United States, (229 U. S. 373, 377), in which it was held that a criminal law is not unconstitutional merely because it throws upon men the risk of rightly estimating a matter of degree —what is an undue restraint of trade. That deals with the actual, not the imaginary, condition other than the facts. It goes no further than to recognize that, as with negligence, between the two extremes of the obviously illegal and the plainly lawful there is a gradual approach, and that the complexity of life makes it impossible to draw a line in advance without an artificial simplification that would be unjust. The conditions are as permanent as anything human, and a great body of precedents on the civil

side coupled with familiar practice make it comparatively easy for common sense to keep to what is safe. But if business is to go on, men must unite to do it and must sell their wares. To compel them to guess on peril of indictment what the community would have given for them if the continually changing conditions were other than they are, to an uncertain extent; to divine prophetically what the reaction of only partially determinate facts would be upon the imaginations and desires of purchasers, is to exact gifts that mankind does not possess." (234 U. S. 223).

While no reference was made by the Supreme Court in the above excerpt to the fact that common law crimes (which form the very foundation stones of the offenses denounced in the Sherman Anti-trust act) were being dealt with in the Nash case, it is yet clearly obvious that the distinguishing features, as between the two classes of cases, brings this case into that class represented by the Kentucky Statutes, rather than the common-law class represented by the Nash case. Indeed, upon principle, I am unable to distinguish the instant case from the Kentucky one. No man would engage in business, and no self-respecting man would remain in business, if his fortune, good name, or liberty is to be determined solely by the heated and prejudiced views of what is unjust and unreasonable which may be entertained by a jury personally embarrassed and harrassed, it may be, by the inordinate rise in prices of all commodities. Such a law may be fit for the trial of the guilty; but laws ought to be fit both to try the guilty and the innocent. A law which is fit only to try those who are guilty necessarily begs the question of guilt, and is, therefore, no better than lynch law.

The definitions, boundaries and limits of a criminal statute ought at least, to be so clear that no man in his right mind can be in doubt when he is violating such statute. There ought not to be necessary any chopping of logic or intricate reasoning from cause to effect in order to decide the question of criminality.

If this law is to stand, then no longer would there seem need of defining crimes by separate statutes. All that will be necessary will be to pass a single sweeping statute, declaring that any person who shall commit any unjust or unreasonable act, or any wrongful or criminal act, shall be deemed guilty of a felony; and leave it to the jury to determine what is unjust, or unreasonable, wrongful, or criminal.

Neither is justification for the indefiniteness and uncertainty which is here in the statute under discussion to be found in any alleged necessity to mitigate a present and crying evil which all right-thinking men must deprecate and abhor; for it would seem that it might simply have been declared that a sale of any necessary for a stated percentage increase in price, beyond cost and carriage, should be a punishable crime. At least, such a law would not be objectionable on the ground here urged. That it would have been arbitrary may be conceded. But the statute here is just as arbitrary, and to its arbitrariness is added an indefinitteness, vagueness, and uncertainty, which is dangerous, beyond excusing, to the property and liberty of innocent men.

For these reasons, and for others which I might

add if leisure allowed, I think the demurrer to the indictment ought to be sustained.

C. B. Faris,
District Judge.

In this connection the learned judge might have observed that two acts, one **penal**, the other **remedial**, cannot be construed in **pari materia**. **U. S. v. Anderson**, 9 Wall 56, 19 L. Ed., 615, 6-8.

Thereupon the plaintiff in error prayed the allowance of a writ of error to this Court on the decision thus rendered upon the demurrer; the petition for the writ being based upon the following assignment of errors:

> First, that the Court erred to the injury of the United States of America in sustaining the demurrer filed by defendant to the indictment, and to each count thereof, in this cause, on the ground that that portion of section 4 of the act of Congress approved August 19, 1917, as amended by the act of Congress approved October 22, 1919, entitled, "An act to amend an act entitled 'An act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel,' approved August 10, 1917, and to regulate rents in the District of Columbia," upon which said indictment is predicated, is unconstitutional and invalid, and by entering a judgment discharging defendant herein from all criminal liability under said section of said act;
>
> Second, that the Court erred to the injury of the United States of America in its construction of said section of said act by its decision and judgment in sustaining said demurrer to the indictment in this cause;

Third, that the Court erred to the injury of the United States of America in sustaining, and not overruling, said demurrer to the indictment in this cause;

Fourth, that the Court erred to the injury of the United States of America in deciding said demurrer to the indictment against the plaintiff and in favor of the defendant.

The writ of error as prayed was allowed and under the statute the issue decided in the District Court is now presented to the determination of this Court upon the record thus made.

POINTS AND BRIEF.

The indictment does not state facts, sufficient to constitute an offense.

I.

The Statute, October 22, 1919, amendatory of Act March 10, 1917, S. 4, as imposing a penalty, is void.

Penalizing by Congress a private intrastate sale made under the conditions of the indictment is beyond the prerogative of Congress.

> In a state of mere theoretical war between the United States and some other nation, it is beyond the power of Congress to impose a basis of prices to govern a sale of even a food made intrastate by one private person to another, in which sale the government has no interest, which sale has no concern with interstate commerce, or Internal Revenue and by which sale the United States can be affected in no manner or degree.

Powers not delegated to Congress are reserved to the States or the people. An enactment by Congress which encroaches upon undelegated powers of the States is beyond the powers of Congress and void.

The Constitution is a law for rulers and the people equally in war and in peace. It protects all classes of men, at all times and under all circumstances.

Ex parte **Milligan**, 4 Wall 121.

Framers of Constitution did not intend to restrain

States in regulation of civil institutions adopted for internal government.

Dartmouth v. Woodward, 4 Wheat, 518, 629;
Hammer v. Dagenhart, 247 U. S. 251, 62 L. Ed. 1101, 1107.

Illustrative distinction made in proclamation of emancipation—between **Missouri** not in rebellion and **Georgia** and other States in rebellion.

Discussion In Argument.

True that private contracts must yield to public welfare when appropriately declared and defined.

Dry Goods Co. v. Service Corporation, 248 U. S. 372, 63 L. Ed. 314.

No absolute freedom to do as one wills, or to contract as one chooses. Liberty is not mere license.

C. B. & Q. v. Maguire, 219 U. S. 567, 55 L. Ed. 338.

Settled that all contracts and property rights are held subject to the fair exercise of the State to prescribe regulations for the general welfare.

Coast Line R. R. v. Goldsboro, 232 U. S. 548, 558, 58 L. Ed. 721, 726.

But consideration of these familiar rules in case of penalizing by the United States of merely local contracts in which government has no concern, must depend upon a degree of necessity resulting from the proximity of a peril, or danger to the general government itself.

We are, of course, sensible of the fact that it is only in cases where legislative power has been clearly transcended in declaring that to be law which is not within legislative competency, that courts are justified in declaring any particular provision of an act of Congress void and without affect. But there are certain fundamental rights of person and property that are beyond the power of Congress to disregard or violate. There are certain fundamental maxims of a free government that would seem to require that the rights of personal liberty and private property should held sacred. At least no court of justice in this country would be warranted in assuming that power to violate and disregard them lurked under any general grant of legislative authority or ought to be employed from any general impression that may be found in any of the articles of the Constitution. These are pharaphrased observations of the District of Columbia Court of Appeals in **Stotenberg v. Frazier**, 48 L. R. A. 220-224. The Supreme Court of the United States has also observed that the legislature may not under the guise of protecting the public interest arbitrarily interfere with private business or impose unusual and unnecessary restrictions on such lawful occupations. In other words, a determination by it as to what is a proper exercise of its police powers is not final or conclusive but is subject to the supervision of the courts. **Lawton v. Steele**, 152 U. S. 133-139, 38 L. Ed. 385-389. Such a line of observation applies as well to Congress.

The instant case.

Indictment charges two independent sales of sugar to two private persons at "unjust" and "unreasonable" prices.

No government concern in sales alleged. No

need of sugar by government alleged. No feature of Interstate Commerce or Internal Revenue alleged. No fact alleged of governmental interest, or concern.

State of war between United States and Germany alleged to be then existing.

But,

Conceding sugar to be a food, or a necessity—a thing essential to human life—yet to justify on the ground of war an invasion by the government of the right of a State to impose conditions upon sales within its borders as it sees fit, such war must be an actual, not a theoretical war existant merely because the President had not proclaimed that it had come to an end.

Discussion In Argument.

II.

The indictment merely states conditions of Statute which deprive citizens of life, liberty and property without due process of law.

Due process of law, the law of the land.

Davidson v. N. O., 98 U. S. 97;
Mo. Pac. v. Haines, 115 U. S. 512, 519;
Scott v. Toledo, 36 Fed. 385 L. L. R. A. 686.

Phrase imports in general a public law equally binding upon all persons and classes alike.

Statute, however, excepts

farmers, gardeners, horticulturists, vineyardists, planters, dairymen, stockmen, and any kind of **agriculturist.**

This is a merely arbitrary exemption—a merely arbitrary exercise of governmental authority.

Giozza v. Tiernan, 148 U. S. 657.

Discussion of Point In Argument.

The case would deprive defendant in error of property without due process of law and hence the amendment is void.

III.

The amendment, no less than the original Statute violates Article VI of the Amendments to the Constitution. Neither original Statute nor amendment inform the accused of the nature and cause of the accusation.

> Laws which create crime ought to be so explicit that all men subject to their penalties may know what act it is their duty to avoid.
>
> **U. S. v. Brewer**, 139 U. S. 278;
> **Tozer v. U. S.** (C. C.), 52 Fed. 917.

Statute—"**unjust**" or "**unreasonable.**" No standard of determination in Statute of unjustness or unreasonableness.

Discussion In Argument.

Standard Oil v. U. S., 221 U. S. 106;
Waters-Pierce Oil Co. v. Texas, 212 U. S. 86.

Both civil cases have no bearing on question.

Nash v. U. S., 229 U. S. 373, distinguished by this Court in **Harvester Co. v. Kentucky**, 234 U. S. 223.

Foregoing cases relied on by government for reversal. Neither affords ground.

Finally—Argument of Judge Faris in opinion on the demurrer below unanswerable.

Judgment should be affirmed.

ARGUMENT.

Proceeding upon the assumption necessitated by the Criminal Appeal Statute, that the only question open in this court upon this writ of error is whether the Statute attacked below upon demurrer is a valid Statute, counsel for defendant in error respectfully submit:

The following provision of Section Four of the Act of August 10, 1917, C. 53, as amended by the Act of October 22, 1919, C. S. 2:

> "It is hereby made unlawful for any person to wilfully . . . . . 'make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries.'" . . . . .
>
> "Any person violating any of the provisions of this section upon conviction thereof shall be fined," etc.,

is invalid as violative of the Constitution and as going in its enactment beyond the powers of Congress.

This broad proposition involves two questions:

1. In a state of theoretical war between the United States and some other nation, it is beyond the power of Congress to impose a basis of prices to govern and control a sale of even a food, made intrastate by one citizen, or private person to another citizen or private person and in which sale the government has no interest, and which bears no relation to Interstate Commerce or Internal Revenue, and by which sale the United States can be affected in no manner or degree.

2. The enactment violates Articles V and VI of the Amendments to the Constitution.

The provision of the Statute which is involved upon this record, violates both of these amendments.

In the court below, only the question as to the Sixth Amendment was considered, but the other questions are involved and presented upon the record now before this Court. While the burden of the case is now upon the government, counsel for defendant in error nevertheless will proceed as if that burden rested upon them, rather than upon the other side. Their brief and argument are submitted on this theory.

Counsel therefore submit.

1. **The enactment is wholly beyond the authority and power of Congress.**

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Constitution commands the United States to guarantee to each State a republican form of government.

In view of the amendments cited and in view of the reservation of powers to the States and the guaranty to each State of a republican form of government, the question, now presented, is how can a Statute of the United States be valid which denounces as a felony a sale of necessaries of life in a State by one private person to another private person in the same State at a price characterized by the Statute as being unjust, or unreasonable? How can such a Statute be valid, when the sale is one in which the government has no interest, either by way of inter-

state commerce, or revenue internal or by way of duties on imports or exports? It must be conceded, that in a time of peace there could be no doubt, that such a Statute would be void. But in the present case, the contention is that war existed when the enactment was had and therefore it must be upheld as necessitated by such war.

For the present the absence of a standard of determination as to justness or reasonableness need not be considered.

Upon this record, the indictment affords the facts of the situation. There is no condition of interstate commerce, no condition of internal revenue. Nothing of such description modifies, qualifies, adds to, or takes from the situation. So by reason of the absence of averment on the subject, it is admitted that the government had no interest whatever in the sale.

A grocer corporation in St. Louis, Missouri, sells to a person in that place one hundred and fifty pounds of sugar at prices evidently satisfactory to both seller and purchaser. Each count of the indictment declares upon a separate transaction—the first covering a sale of about fifty pounds of sugar at 20¼ cents per pound and the second covering a sale of about one hundred pounds at 19½ cents per pound. The transaction is purely an ordinary private sale of personal property. It is nothing more. The government is not concerned in and has no connection with the transaction. The terms of sale were of mutual agreement. The government was not a party, or a contemplated party. No part of the commodity went to the government, or was intended for the government.

The government does not even need for any purpose one grain of the commodity sold. The government is not even in the market for sugar, but there is a condition of war obtaining in Europe, which had been terminated in point of fact when the penalty was imposed but not in point of law merely because the President had not, by proclamation, declared the war to have come to an end. That is, the continuance of the war is to be predicated upon the absence of the presidential proclamation.

The provision of the Statute which now affords the penalty invoked against this intrastate, local and private sale, was imposed after the war had, in fact come to an end, and after the troops of the United States of America had been either withdrawn from the fields of war, or had put their guns of mammoth calibre in such an innocuous condition, that they could not be used even in the manufacture of puffed breakfast food. An armistice was signed as early as November, 1918. From that day no gun was fired by the United States against hostile forces of a public enemy.

But by a statute enacted **without penalty** when the war was in fact and law "on," but amended **with penalty** after the war **in fact** had ended, but **in legal fiction** had not ended, sales in which the government had and could have no concern are now sought to be penalized, because the price of the commodity was "unjust" or "unreasonable."

The Supreme Court of the United States (after an argument of great power by Jeremiah S. Black, which it was the good fortune of the writer of this brief to hear and by which he was most deeply impressed, declared: **Exparte Milligan**, 4 Wall. 2, 121—

> The Constitution of the United States is a law for rulers and people, equally in war and in peace and covers with the shield of its protection all classes of men, at all times and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man that that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government within the Constitution has all the powers granted to it which are necessary to preserve its existence.

No greater exigency had ever threatened the government than the war of the Rebellion. The life of the Republic hung on the balance during those years of internecine strife. Even the felon shot that wounded the captain at Antietam was fired by a brother American's hand. In the very midst of loyal homes, the spirit of treason stalked—giving aid and comfort where it dared not openly rebel. Yet actual war was not prevailing in a given locality but the shield of protection of the Constitution covered in that locality, in so far as courts were concerned, even one of traitorous purposes; civil, not martial law prevailed and controlled except where civil courts were actually closed by invasion or locally existing war.

Allusion has been made to Antietam. Counsel avail themselves of conditions then existing to illustrate the force of the contention, that not even a state of war in Europe to which the United States, at one time was a party can justify interference by the government with private contracts local to a State of the

United States and in which the government has and can have no interest whatever.

Slavery in the United States was purely an institution local to the State where it obtained. Massachusetts gave it up, because it did not pay. Georgia and States which thought they seceded, kept it and went to war for it, because the invention of the cotton gin made it pay. The National Government of 1861 sought to save the Union, by suppressing a senseless rebellion. The purpose was not to overthrow or interfere with the established institutions of States which had seceded, as it was termed, and whose slave owners were in rebellion, but to maintain the Constitution and preserve the Union. The **captain** who was struck down at Antietam, will recall conditions then obtaining from personal observation and experience. But may it not be pertinently inquired of this Court:

> Why was it, that when Missouri was not in rebellion, but Georgia was, Congress, at the instance of Mr. Lincoln, endeavored to provide for "gradual emancipation" in Missouri on a basis of compensation to slave owners, while the same body stood ready to sustain the President and did sustain him in his proclamation of freedom to slaves in States in rebellion, issued September 22, 1862, five days after Antietam?

The proclamation was necessitated by the exigency of war. It was conceived that the end of slavery in States in rebellion would end the war of that rebellion. Missouri was not in rebellion, hence her slaves were not then freed—the necessity did not exist in Missouri. Whatever may be said of the proclamation of emancipation as a valid measure in general, it was

issued as a war measure. It was of vital concern to the United States. It was issued by virtue of the war power of the President. It was necessitated by the fact of rebellion. Its issue was one cause of the failure of the rebellion. Yet Mr. Lincoln carefully discriminated between localities—States and parts of States—where slavery should be abolished, because of the necessities of war waged against the United States in such States and parts of States, and States where rebellion did not dominate local processes and conditions. Neither George Ticknor Curtis, nor Horatio Seymour stood for a closer observance of the solemn admonitions and reservations of the Constitution than did Abraham Lincoln in distinguishing between States, where the people of some were and the people of others were not in rebellion.

Counsel respectfully submit that the episode of emancipation affords the strongest possible exposition of the reservation of power in the States over their purely local and domestic affairs. It is respectfully submitted farthermore, that speaking through the **captain** of Antietam's field, this Court has observed the distinction now contended for in **Schenck v. United States**, 63 L. Ed. 470, 473. Disloyal utterances are not treason, but when they directly affect the necessities of the government in time of actual war, they may be punished by the law powers of the government. The learned Jurist speaking for this Court profoundly declares the question to be one of proximity or degree. But war to justify a temporary suspension of true State rights, must be actual war—not one ended in fact, but theoretically continued by a limitation, or condition of an Act of Congress not in itself declaring war.

"The framers of the Constitution did not intend to restrain the States in the regulation of their civil institutions adopted for internal government." **Dartmouth College v. Woodward,** 4 Wheat 518, 629.

As was said in **Hammer v. Dagenhart,** 62 L. Ed. 1101, 1107, to sustain this Statute would sanction an invasion by the Federal power of the control of a matter purely local in its character and over which no authority has been delegated to Congress. It is the necessity of fact, not a statutory extension of a fictitious existence which is the test to which this Statute must be subjected.

This record makes a clear and strong case for appeal to the protection of the Constitution.

There is no question here of proximity or degree. Whatever may have been a supposed exigency in 1817, when Section 4 of the Act of March 10, 1917, was enacted without penalty as to unjust and unreasonable prices in private sales of foods or necessaries, there was no conceivable exigency when a penalty was added by way of amendment by the Act of October 22, 1919.

The war with Germany was ended. A treaty of peace with Germany had been negotiated by the President and he had submitted it to the Senate for their concurrence. All of this had been done in the name of peace before this penalty was imposed.

One further condition obtained as a fact on October 22, 1919. The Hun was not at our door. We could slumber without fear of being murdered in our beds. Peace reigned in Warsaw. It reigned no less in these United States of America. There was no existent

emergency, no existent peril. Were it not for the parliamentary decorum which requires one to speak guardedly to one branch of the government of the proceedings of a co-ordinate branch, one might say that the very preamble of the Statute as amended in 1919 is untrue. It was not by reason of the existence of a state of war that it was essential to the national security and defense, or for the successful prosecution of the war, or for the support and maintenance of the Army and Navy, or to assure an adequate supply and equitable distribution, or to facilitate the movement of foods, or to prevent locally or generally, scarcity, monopolization, hoarding, injurious speculation, manipulation and private controls affecting such supply, distribution and movement, or to establish and maintain governmental control of such necessaries during the war, that the extraordinary provision of the Statute (the penalty imposed for the first time) was enacted. Whatever may have been the need in 1917; in October, 1919, there was none.

There was no national defense to be maintained. The **necessity** for it (if we are to be controlled by such condition), did not exist. There was no war to be successfully prosecuted because the craven hearted foe begged for peace upon bended knee and hostilities had been, in fact permanently ended; no army or navy needed to be supported, or maintained upon other than a basis of peace; no adequate supply and equitable distribution of foods was necessary to be assured **by the United States**; no movement of foods was necessary to be facilitated **by the United States**, and there was no war during which monopolization, hoarding, injurious speculation, manipulation and private controls were of necessity to be prevented be-

cause of their hindrance of some operation of the government and there was no war during which it was necessary to establish and maintain governmental control of foods, feeds, wearing apparel and containers primarily designed to contain foods, feeds or fertilizers.

"Peace is always beautiful," but the poet builded far worse than he knew, because a peace won by the United States will have been marred by a sorry, woeful blemish if this infraction of the Constitution is sustained as a valid enactment of the Congress of the Republic—the Congress an invader of the reserved rights of the States in a time of actual peace.

Counsel are not aware of any departure from this basic rule by the Court which from the adoption of the Constitution has proclaimed it to be and sustained it as evidencing the most sublime ordinance enacted by a free people in the history of civilized mankind.

Counsel do not concede, that sugar is a food, or that it is necessary to human life, in that it is a commodity without whose use human creatures cannot exist. They contend, that sugar is not a food—it is not even declared to be such by the Statute. They contend, that it is not a necessary—it is not so declared to be by the Statute. Such a consequence if it may be reached, of course must end the inquiry upon this writ of error. It is not a food by reason of some proclamation of the President of the United States. Even in time of war the President cannot legislate and a proclamation declaring something to be a food, or a commodity necessary to human existence is beyond his power or discretion. On this subject, it was for Congress to legislate. The proclama-

tion alone declared sugar to be a food. The President legislated, the Congress, alone empowered if at all, did not legislate.

But counsel take no narrow view of this Statute upon this point. Their contention is the broad view of the Constitution.

Sales of articles of food, local to a given State, are to be governed by the laws of the State, unless they fall within the purview of Internal Revenue. Armies were said by Napoleon to travel upon their bellies and food to an army is a necessity. But under our system of government, unless an exigency of war exists locally in a given State and the government even needs an article of food dealt in in such given State, but the price does not affect the government at all then whether the article shall be sold at a "just" or "reasonable rate" between individuals is for the State to settle and not for Congress.

Counsel have found upon this record, as has been indicated, no question of proximity or degree. It is true, that private contracts must yield to the public welfare when the latter is appropriately declared and defined. **Union Dry Goods Co. v. Georgia Public Service Corporation**, 248 U. S. 372, 63 L. Ed. 314. But there must at least be some proximity to exposure of public welfare to a recognizable, possible peril, before considerations of public welfare can override considerations of private right.

There is no absolute freedom to do as one wills or to contract as one chooses. Liberty implies the absence of arbitrary restraint not immutable from rea-

sonable regulations and prohibitions imposed in the interest of the community.

C. B. & Q. R. R. v. Maguire, U. S. 367, 33 L. Ed. 338.

Yet whether regulations supposed to impinge upon freedom to do or contract, are reasonable must depend on the proximity of some peril or exigency to which they are applicable.

So it is settled, that all contracts and property rights are held subject to the fair exercise of the power of a State to establish all regulations necessary to secure the good order, comfort or general welfare of the community of that State.

Coast Line R. R. v. Goldsboro, 232 U. S. 548, 558, 58 L. ed. 721, 726.

Yet the government of the United States must guarantee to each State a republican form of government. The people of the State must be free to act within the purview of reasonable regulations imposed by the State. No other consequence can there be from a government in form, or fact, republican. The necessary and unavoidable consequence must be, that each State of the United States must be left free to impose its own regulataions upon prices and sales of commodities in its own territory and this right cannot be impinged upon, qualified, suspended or impaired except by reason of a present exigency, or unquestionable danger to the institutions of the general government. And even as to this, there is doubt.

The moving right to interfere can only be necessity. The power of restraint open to the general

government must depend upon the necessities of the government, for instance in a war which may imperil that government. But if there is no actual war, there is no peril and if there is no peril, there is no necessity of protection from a threatening peril. There is none against which to provide.

Upon such an issue as is joined upon this record, one must look at facts and substance rather that at fiction or directory provisions of Statute. Counsel therefore submit, that when the Armistice was signed in November, 1918, when the Army and Navy of the United States were recalled and put upon a peace footing; when the President of the United States, as was his right and duty, proceeded to negotiate a treaty of peace; when the general government proceeded to sell its stores, supplies, equipments of war, fouls, feeds and necessaries of war; when, if you please, the existence of peace was proclaimed by the whole people with the noise, furore, wild enthusiasm and exuberant joy of John Adams' Fourth of July celebrations, the war declared by the Congress April 7, 1917, was ended as far as concerned private contracts between private individuals and wholly local to the State written which they were made. There was no impending peril to the general government. There was no need of legislation aimed merely at private contracts and dealing between private persons in any State, which concerned neither Interstate Commerce, nor Internal Revenue.

Counsel likewise submit, that the provision of the Act of August 10, 1917, that its enactment should cease to be in effect when the existing State of war between the United States and Germany had termi-

nated, which fact and the date of such termination should be ascertained and proclaimed by the President was merely a provision to be effective upon the existence of a condition of fact (the proclamation of such existence being merely directory); that such fact having supervened before the amendment of the Statute, then was war at an end, no necessity for the amendment existed and its then imposition of a penalty was unenforcible and void.

If the fact of cessation of war, declared in 1917, cannot now be determined as a fact existing in October, 1919, for the purpose of concluding whether Congress could then penalize **lawful** private contracts made **intrastate**, because the President had not then **proclaimed** the war to be at an end, there is room for further legislation, by way of amendment to the Act of March 10, 1917, which will even more arbitrarily intrude upon the reserved and undelegated powers of the States. There can be no limit to such legislation, but Presidential will.

Counsel have not failed to consider the ruling of this Court in **Hamilton v. Kentucky Distilleries**, Nos. 380 and 602. The question presented **there** is not that **now presented**.

Here, a statute, enacted in August, 1917, when a state of war undoubtedly and actually existed, recited, that **"by reason of the existence of a state of war"** it was **essential to the national security and defense "for the successful prosecution of the war"** and for **"the support and maintenance of the Army and Navy"** to assure an adequate supply and equitable distribution of foods, feeds and other commodities mentioned in the Act, and by Section 4 made it

unlawful to make an "unjust" or "unreasonable" rate in handling necessaries, but denounced no penalty and created no offense for or in the doing declared to be unlawful. This Act was amended October 22, 1919, by adding in Section 1 "**wearing apparel and containers primarily designed or intended for containing foods, feeds or fertilizers,**" but leaving the recital of the necessity unchanged; and by denouncing for the first time in Section 4 the felony now sought to be punished.

The Court observes at once, that what may be termed the limitation clause of Section 24, which remains unchanged, can have no influence in determining whether the penalty imposed by the amendment can be enforced. The question of **proximity** or **degree** was presented October 22, 1919. Did the necessity **then** exist? Was it **then** necessary to invade the rights of States; then necessary to the national security and defense; then necessary for the successful prosecution of the war and then necessary for the support and maintenance of the Army and Navy to enact the penalty for an act lawful within the given State, but to be regarded by some uncertain, indefinite and indefinable standard as unjust or unreasonable? Counsel lay no stress upon the declarations of necessity in the First Section of the Statute. They neither added to, modified, qualified or detracted from the Act. If the necessity existed when the Act was passed the question of proximity or degree was answered. But if the necessity did not exist when the punishable offense was first created by the amendment of October 22, 1919, no question of proximity or degree was presented and

Congress could impinge upon the rights of States only in defiance of the Constitution.

Counsel, who prepared this argument, yields to none in his espousal of the war against Germany and in his recognition of all of its dire necessities. He deprecates, however, as all Americans should, all scare-crow absurdities of law, or want of law which infected our people for a time as cholera morbus disturbs the normal function of the descending colon, but he deprecates still more, vastly, indescribably more a declaration by any National Court, that on October 22, 1919, there existed a necessity for the invasion of the rights of States vigorously reserved to themselves by the express limitations of the Constitution.

One concedes, as he must, that where an enactment is within the scope of power legitimately to be exercised by Congress, the necessity for the legislation is, as a rule, to be determined by the legislative branch of the government. But this concession depends upon the legitimate exercise of the power. Where, as here, when the original Statute was passed, there may have been need of it, because the operations of the government might in some way have been affected by existing war, yet, as here again, when the Statute was amended and an offense for the first time thereby denounced, there was no need of the enactment, so far as concerned the government, and it was not necessitated by any public exigency the judicial branch will not hesitate to annul the legislative action, as would be its prerogative and duty.

The proposition discussed may therefore be thus disposed of:

Dealing in necessities of life, or foods thus necessary, can in general be lawfully controlled by Congress, only where it falls within the domain of Internal Revenue, or Interstate Commerce. The power of such control remains reserved to the States unless some exigency threatening the existence or operation of the National government is immediately proximate, or actual existent. Even this concession is open to serious question.

The Amendment of October 22, 1919, for the first time, and as of that date, denounces an offense to be evidenced by an act of dealing within a State by citizens of that State upon terms lawful under the laws of that State and agreed upon by the participating parties. The offense denounced comes neither within Internal Revenue regulations, nor conditions of Interstate Commerce. No exigency of actual war exists and there is no other public exigency even proximately threatening the National government.

To say, that the so-called Lever Act might be amended October 22, 1919, so as to create an offense for the first time out of a transaction, neither within the domain of Internal Revenue, nor Interstate Commerce, merely because the President had not proclaimed the war with Germany to have ended, would be to determine that Congress may continue to usurp the reserved powers of the States, if Congress so determines, even until the crack of doom.

No Congress may ever repeal the Lever Act and no President of the United States may ever proclaim the war with Germany to have ended. Congress has not provided **when** the President **must** proclaim. **Idcertum**

est quod certum riddi potest. But suppose he never proclaims?

Every consideration of the limited powers of Congress cries out against the possibility of monstrous consequence, if the theory of the Amendment and the indictment is sustained.

Counsel further submit that the penalty sought to be imposed by the amendment of October 22, 1919, cannot be enforced. The amendment, as applicable to the indictment is void.

1.— It violates Article V of the Amendments to the Constitution.

No person shall be deprived of life, liberty or property without due process of law. It is matter of hornbook law, but what is "due process of law?" The inquiry is answered by the courts as finding in the words "law of the land" one equivalent of this phrase "due process of law." **Davidson v. N. O.**, 96 U. S. 97; **Mo. Pac. Ry. v. Hames**, 115 U. S. 512, 519; **Scott v. Toledo**, 36 Fed. 385, 1 L. R. A. 686.

It is a familiar rule, that the phrase imports a general public law, equally binding upon every member of the community, which embraces all persons who are in or may come into like situations. A law which operates partially and upon certain classes alone, exempting others enumerated, and makes distinctions which on their face are arbitrary and capricious is not a valid enactment as being the law of the land—"due process of law." Tested by this familiar rule the Amendment of October 22, 1919, of the Act of August 10, 1917, is void.

By this Amendment one who makes an "unjust" or "unreasonable" rate or charge in handling or dealing in, or with any necessaries" in purely private transactions commits a felony, providing he is not a **farmer** or a **gardener**, or a **horticulturist**, or a **vineyardist**, or a **planter**, or a **ranchman**, or a **dairyman**, or a **stockman**, or some other kind of **agriculturist**, with respect to the

farm products produced or raised upon land owned, leased or cultivated by him.

A **wholesale grocer** sells **intrastate** at an "unjust" rate, or an "unreasonable rate," sugar produced upon land owned by **sugar planter A** at the peril of a sojourn in the penitentiary; but **planter A** may sell the same product of his own land at a price which will satisfy the most greedy and consuming appetite of the most unscrupulous profiteer!

A **packer of meats** sells intrastate at an "unjust" rate, meats packed by him from cattle of a **ranchman** at the peril of observing the difference between Atlanta's penitentiary and the New Willard, but the **ranchman** may sell with impunity the same kind of meats at prices as unjust as the avarice of man can imagine or devise. And thus one may proceed down the list of classes of persons to whom the amendment penalizing intrastate contracts shall not apply. The illustrative employment of the term "unjust," for the present, assumes that the Statute creates a standard of determination as to injustice, or unreasonableness, which counsel do not, however, concede.

Now, "due process of law," within the meaning of Amendment V is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government. It certainly is wanting if the law does not operate on all alike, and does subject the individual to an arbitrary exercise of government powers. **Giozza v. Tiernan**, 148 U. S. 657.

Commentators on the Constitution say that the United States are not by the Constitution expressly forbidden to deny anyone the equal protection or

the laws, but that it would seem that the broad interpretation which the prohibition as to due process of law has received is sufficient to cover very many of the acts which if committed by the States might be attacked as denying equal protection. Thus it has been repeatedly declared that enactments declared against particular individuals or corporations or classes of such without any reasonable ground for selecting them out of the general mass of individuals or corporations amount to the denial of due process of law as far as their life, liberty or property is affected. One of the requirements of due process of law as stated by this Court is that the laws must operate on all alike and not subject the individual to the arbitrary exercise of the powers of government. Accordingly it is respectfully submitted that where this Court encounters a Statute which, as does the Statute now being considered, separate and distinguish a class or classes of individuals from all other classes of individuals and relieves such separated classes from liability for the commission of the same acts for which other classes are held responsible it is the obvious duty of this Court to declare such a Statute to be invalid, unenforceable and void. It is fundamental that whenever the government undertakes to deprive a person of his liberty as a punishment for crime it can only do it by virtue of a valid constitutional statute defining the crime. The Statute upon which or by which a person is deprived of his liberty is a part of the process of law which is used against him and it must be such process of law as is consistent with and sustainable under the law of the land. In **Murray's lessee v. Hoboken Land Company,** 18 Howard 272-276, an adjudication which the trend of events seems to bring forward for con-

stant reference, it is said that the provision of the Constitution now being considered is a restraint on the legislative, as well as on the executive and judicial powers of the government and cannot be so construed as to leave Congress free to make any process, due process of law, by its mere will.

Counsel venture to indulge themselves in no degree of despair with reference to the outcome of conditions which are now said to surround the people of the United States with reference to the situation of their government under the Constitution.

Counsel do not concede that the time has come in which citizens are forced to take refuge in the mandates of the Supreme Court of the United States under the Constitution, as having been deprived of every other refuge to which an honorable appeal can be made with any hope of salvation or relief. Yet this amendment of October 22, 1919, may lead the way to more direful, unconstitutional monstrosities.

There can be no necessity of war, or otherwise, which can justify an enactment by Congress, that if a merchant sells at an unjust rate he commits a felony, but that if any kind of an agriculturist does the same thing he shall go scot-free. There is no law of this free land which can lawfully penalize one, and, for the same act, expressly exempt another.

I am not a Virginian, said Patrick Henry, but an American. He was not in favor of the Constitution, but he preferred death to loss of liberty. In the spirit of that day, unending as the Constitution, counsel submit, that the liberty of the citizen, his equality with his fellows before the law as safeguarded by the Constitution is of greater worth than all the victories of war.

Proceeding with the argument we now come to the ground upon which the Court below sustained the demurrer to the indictment.

2. The Statutory Amendment violates Article VI of the Amendments to the Constitution.

One, of course, thinks well of the bridge which safely bore him over the stream; and one very naturally shows that he was duly impressed by the judgment of a trial Judge in his favor when upon error that judgment is attacked. Yet counsel, with the whole bar at his court, ventures to express the obligation of the community of the Eastern District of Missouri to the trial Judge for his fearless and conclusive demolition of this peculiarly abnormal Statute.

> It is hereby made unlawful * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries * * *. Any person violating any of the provisions of this section upon conviction, thereof, shall be fined not exceeding $5000, or be imprisoned for not more than two years or both.

Provided, he is not a farmer stockman or "other agriculturist!"

Indeed, counsel might perhaps with the better judgment, leave the discussion of this remaining question to the convincing opinion of he learned Judge who sustained the demurrer. Counsel, nevertheless, venture to suggest:

> "In all criminal prosecutions the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation;

which is a provision daily invoked in all courts of the Union and under which this Court has gone further in maintenance of individual right, than any court in Christendom. To inform one accused of crime of the nature and cause of the accusation is to not only find against him a good and sufficient indictment, but is to base that indictment upon a Statute which is so clear and certain, that the accused, can determine for himself, as his Honor Judge Faris quaintly observes "whether he is a felon or a patriot." "Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid. **United States v. Sharp** Pet. C. C. 118. Before a man can be punished, his case must be plainly and unmistakably within the Statute. **United States v. Lacher**, 134 U. S. 624, 628."

United States v. Brewer, 139 U. S. 278, 35 L. Ed. 190.

The criminality of an act, said Justice Brewer on the Circuit, cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty." **Tozer v. United States** (C. C.), 52 Fed. 917.

Now, what information does either indictment or Statute give the accused upon this record? Of course, we are limited in the inquiry to the Statute and what information does it give? What is an **"unjust"** rate —what is an **"unreasonable"** rate? By what standard shall the accused judge himself? He must have some standard by which he can determine the unjustness, or the unreasonableness of his act. This amendment provides him with none. This Court has

observed from the record, that Judge Faris first had the infirmity of the Statute brought to his attention at a trial before a jury. He appreciated, at once, the force of the **ore tenus** suggestion, that the Statute was invalid. It is not out of line, to indicate, that Judge Faris proceeded to hear the evidence permitting a wide range of inquiry so as to determine whether there was, or could be an offense. The question of justness, or reasonableness was the gist of the controversy. How could it be determined? A wholesale grocer was permitted to express his opinion on the subject. What else could be done? He thought a price some cents below the price of such sale would have been a fair price, or would have afforded a fair or reasonable profit.

Now the dilemma in which this incident put judge, jury, defendant, United States Attorney and defendant's attorney was as absurd as it was formidable. What if Tompkins, wholesale grocer, thought defendant's price was unjust; what of it? It still remained for the jury to find the fact and they were not bound to regard Mr. Tompkins' opinion as conclusive. In fact, they were not bound to credit him at all, even in the absence of countervailing testimony. Furthermore, how could the Judge charge the jury? What had been furnished the jury in that opinion of the witness to enable them to determine beyond a reasonable doubt, the guilt of the defendant? If the case had gone to the jury, and if the jury had found against the defendant, they could have enjoyed only the consoling reflection:

> From ignorance our comfort flows,
> The only wretched are the wise.

Accordingly, Judge Faris, having duly animadverted upon "profiteering," told the jury:

> "Congress alone has power to define crimes against the United States. This power cannot be delegated to the juries of this country. Therefore, because the law is vague, indefinite and uncertain and because it fixes no immutable standard of guilt, but leaves such standard to the variant views of the different courts and juries which may be called on to enforce it and because it does not inform defendant of the nature and cause of the accusation against him, I think it is constitutionally invalid and that the demurrer offered by the defendant ought to be sustained."

Now, upon the present record, the government sought on the demurrer to the indictment to sustain the statute upon the authority of **Standard Oil Company v. United States**, 221 U. S. 106; **Waters-Pierce Oil Company v. Texas**, 212 U. S. 86—both civil cases having no application to the present case—and **Nash v. United States**, 229 U. S. 373, a criminal case. The contention is here reviewed upon the present writ.

But the issue joined here cannot be determined by the two civil cases neither of which involved the validity of a Statute under the Sixth Amendment. The **Nash Case** was clearly distinguished by this Court in **Harvester Company v. Kentucky**, 234 U. S. 223, where it is said:

> "We regard this decision as consistent with **Nash v. United States** (229 U. S. 373, 377), in which it was held that a criminal law is not unconstitutional merely because it throws upon men the risk of rightly estimating a matter of degree—what is an undue restraint of trade. That deals with the actual, not the imaginary,

condition other than the facts. It does no further than to recognize that, as with negligence, between the two extremes of the obviously illegal and the plainly lawful there is a gradual approach and that the complexity of life makes it impossible to draw a line in advance without an artificial simplification that would be unjust. The conditions are as permanent as anything human, and a great body of precedents on the civil side coupled with familiar practice make it comparatively easy for common sense to keep to what is safe. But if business is to go on, men must unite to do it and must sell their wares. To compel them to guess on peril of indictment what the community would have given for them if the continually changing conditions were other than they are, to an uncertain extent; to divine prophetically what the reaction of only partially determinate facts would be upon the imaginations and desires of purchasers, is to exact gifts that mankind does not possess." (234 U. S. 223.)

Counsel could no better conclude this discussion of this question than in the inspiring, calm and judicial utterance of the trial Judge below:

> The definitions, boundaries, and limits of a criminal statute ought, at least, to be so clear that no man in his right mind can be in doubt when he is violating and when is not violating such statute. There ought not to be necessary any chopping of logic or intricate reasoning from cause to effect in order to decide the question criminality.
>
> If this law is to stand, then no longer would there seem need of defining crimes by separate statutes. All that will be necessary will be to pass a single sweeping statute, declaring that any person who shall commit any unjust or unreasonable act, or any wrongful or criminal act,

shall be deemed guilty of a felony; and leave it to the jury to determine what is unjust, or unreasonable, wrongful, or criminal.

Neither is justification for the indefiniteness and uncertainty which in here in the statute under discussion to be found in any alleged necessity to mitigate a present and crying evil which all right-thinking men must deprecate and abhor; for it would seem that it might simply have been declared that a sale of any necessary for a stated percentage increase in price, beyond cost and carriage, should be a punishable crime. At least, such a law would not be objectionable on the ground here urged. That it would have been arbitrary may be conceded. But the statute here is just as arbitrary, and to its arbitrariness is added an indefiniteness, vagueness, and uncertainty, which is dangerous, beyond excusing, to the property and liberty of innocent men.

These views of Judge Faris are concurred in by District and Circuit Judges.

Detroit Creamery v. Kinmore, 264 Fed. 845;
Lamborn v. McAvoy, 265 Fed. 914;
U. S. v. Armstrong, 265 Fed. 683.
L. & N. R. R. v. Commissioners, 19 Fed. 679, 691.

This last case is a peculiarly instructive one. It was a bill for injunction based upon penalties imposed upon unjust and unreasonable compensation exacted by the carrier for carriage of freight. After an exhaustive review of a Statute which speaks of "unjust and unreasonable compensation," of "unjust and unreasonable discriminations" and of a "fair and just return" without providing a standard by which any such quality could be determined, the Judges declared the Statute to be invalid: "**No citizen under the pro-**

tection of this Court can be constitutionally subjected to penalties and despoiled of his property, in a criminal or quasi criminal proceeding, and—and by force of such indefinite legislation."

The foregoing Brief and Argument have been prepared before the receipt of the Brief for the government. It is enough to say, that a perusal of that Brief, however has not led the counsel for the defendant in error to change their views of the invalidity of the Amendment of October 22, 1919.

In fact, the proposition involved here is so nearly self evident, that counsel are almost impelled to apologize for their own argument.

Finally, however, what does the situation upon this record present and indicate?

The jurisdiction of this Court depends upon the amendment of October, 1919. Its validity or invalidity is the sole question to be considered. The insufficiency of the indictment is not to be considered as the basis of the present writ of error. But why would not a test of the indictment involve a test of the Statute? The sale in which the government had and could have no concern, was at an "unjust" and "unreasonable" price. So says the indictment and that is all it does say. Shades of **United States against Cook**, of **United States against Cruikshank**, of **United States v. Carl**, where is the faintest descent to particulars in this indictment so as to advise the accused of the nature and cause of the accusation, or enable the accused to properly prepare for trial, or enable him to plead in bar to another indictment, for the same offense, the acquittal or conviction upon this indictment? And,

farthermore, where in the indictment formulated merely in the language of the Statute are facts stated, so that the trial court can determine upon those facts whether an offense has been committed? If juries are not to be left to arrive at the necessary conclusion of fact through guess work alone, what is to be said of the degree of guess work imposed upon the trial court, when it is left to arrive upon a correct determination of the sufficiency of the indictment upon the basis of facts not pleaded, and not pleaded because they do not exist? There are more things in Heaven and Earth than are dreamt of in the philosophy of this attempted regulation of private sales, made intrastate, in which the government, or the people of the United States can have no interest by reason of any governmental emergency, or necessity, proximately impending or not dependent upon mere fiction or conjecture.

It is respectfully submitted, that the judgment should be affirmed.

Chester H. Krum.

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For Defendant In Error.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920

No. 324

THE UNITED STATES OF AMERICA
Plaintiff in Error

vs.

L. COHEN GROCERY COMPANY
Defendant in Error

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

JOHN A. MARSHALL,
THOMAS MARIONEAUX,
D. N. STRAUP,
JOEL F. NIBLEY,
As amici curiae.

W. F. ROBERTS CO. WASHINGTON D. C.

IN THE

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THE UNITED STATES OF AMERICA
Plaintiff in Error

vs.

L. COHEN GROCERY COMPANY
Defendant in Error

MOTION

Now come John A. Marshall, D. N. Straup, J. F. Nibley and Thomas Marioneaux, of Salt Lake City, Utah, and represent to this Honorable Court that they are of Counsel for the Utah-Idaho Sugar Company, a corporation and its directors against whom there is pending an indictment in the District Court of the United States, for the District of Utah, for alleged violation of Section 4 of the Act of August 10, 1917 (as amended Oct. 22, 1919, Sec. 2, Chap. 80, Stat. 1919), and against whom complaints have been filed for alleged offenses against said statute in the States of Idaho and South Dakota.

That in said prosecutions in said States the charges are that the defendant sold sugar at "unjust and unreason-

able rates and charges," and that the constitutionality of said section of said statute, and the proper construction thereof, are necessarily involved; and that said questions are involved in the instant case and in numerous prosecutions pending in the United States District Courts throughout the country, and are therefore of great public interest.

Wherefore we have prepared a brief discussing said questions and ask leave to file it as *amici curiae*, both the plaintiff and the defendant in error having consented that such leave may be granted if to this Honorable Court such leave shall seem meet and proper.

JOHN A. MARSHALL,

THOMAS MARIONEAUX,

D. N. STRAUP,

JOEL F. NIBLEY,

As amici curiae.

October 9, 1920.

Supreme Court of the United States.

OCTOBER TERM, 1920.
No. 324.

UNITED STATES OF AMERICA,
Plaintiff in error,
vs.
L. COHEN GROCERY COMPANY,
Defendant in error.
IN ERROR TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI.

No. 337.

HARRY B. TEDROW, United States Attorney,
Appellant,
vs.
A. T. LEWIS & SON DRY GOODS COMPANY, et al.,
Appellees.
APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO.

BRIEF FILED BY LEAVE OF COURT IN BEHALF OF LAKE & EXPORT COAL CORPORATION.

WILLIAM D. GUTHRIE,
BENJAMIN F. SPELLMAN,
BERNARD HARGROVE,
Amici Curiae.

INDEX

TABLE OF CASES.

Supreme Court of the United States.

OCTOBER TERM, 1920.

No. 324.

UNITED STATES OF AMERICA,

Plaintiff-in-error,

vs.

L. COHEN GROCERY COMPANY,

Defendant-in-error.

IN ERROR TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI.

No. 357.

HARRY B. TEDROW, United States Attorney,

Appellant,

vs.

A. T. LEWIS & SON DRY GOODS COMPANY, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO.

BRIEF FILED BY LEAVE OF COURT IN BEHALF OF LAKE & EXPORT COAL CORPORATION.

STATEMENT.

The Lake & Export Coal Corporation is a West Virginia company engaged in the business of buying and selling coal. In August of this year warrants were issued against it and its officers charging them with having violated the so-called Food Control or Lever Law (act of Congress of August 10, 1917, as amended by the act of

October 22, 1919—40 Stat. 276, c. 53; 41 Stat. 297, c. 80) by having sold some coal at an unjust and unreasonable price. No hearing has yet been had upon these charges. The company and its officers, however, are directly interested and will hereafter be materially affected by the determination of the questions concerning the constitutionality of the Lever Law raised in the above entitled cases.

The following argument is addressed to the consideration of three propositions relating to the validity of the enactment in question with a view to establishing that it is unconstitutional in at least three respects, namely: (1) that it violates the Fifth and Sixth Articles of Amendment to the Constitution of the United States, inasmuch as the offense denounced as a felony in the statute is defined only as the act of making "any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries"; (2) that the enactment violates the Fifth Article of Amendment to the Constitution of the United States, inasmuch as it arbitrarily sets up a favored class by exempting farmers, gardeners, coöperative societies, etc., from the operation, requirements and penalties of the statute in and by the provisos to section 4 of the act as amended October 22, 1919, and (3) that the enactment is void as an attempt by the Federal Government to continue the exercise of war power at a time when there is no war emergency to authorize such an interference with the rights of the several States and the persons therein.

The statute as originally passed on August 10, 1917, and as amended on October 22, 1919, is long and treats of many matters, and, as it will undoubtedly be fully laid before the court by counsel for the parties in the cases

at bar, it is not deemed necessary to set it forth at length in this brief. For the purposes of the present discussion, it is sufficient to refer to the provisions of sections 1 and 4 as amended in October, 1919. These read as follows, the recent amendments of October 22, 1919, being italicized:

> "That by reason of the existence of a state of war, it is essential to the national security and defense, for the successful prosecution of the war and for the support and maintenance of the Army and Navy, to assure an adequate supply and equitable distribution, and to facilitate the movement of foods, feeds, *wearing apparel, containers primarily designed or intended for containing foods, feeds, or fertilizers;* fuel, including fuel oil and natural gas, and fertilizers and fertilizer ingredients, tools, utensils, implements, machinery and equipment required for the actual production of foods, feeds, and fuel, hereafter in this Act called necessaries; to prevent, locally or generally, scarcity, monopolization, hoarding, injurious speculation, manipulation, and private controls affecting such supply, distribution, and movement; and to establish and maintain governmental control of such necessaries during the war. For such purposes the instrumentalities, means, methods, powers, authorities, duties, obligations, and prohibitions hereinafter set forth are created, established, conferred and prescribed. The President is authorized to make such regulations and to issue such orders as are essential effectively to carry out the provisions of this Act. . . .
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> "Sec. 4. That it is hereby made unlawful for any person willfully to destroy any necessaries for the purpose of enhancing the price or restricting the supply thereof; knowingly to commit waste or willfully to permit preventable deterioration of any necessaries in or in connection with their production, manufacture, or distribution; to hoard, as defined in section 6 of this Act, any necessaries; to monopolize or attempt to monopolize, either locally or generally, any necessaries; to engage in any discriminatory and unfair, or any deceptive or wasteful practice or de-

vice, or to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries; to conspire, combine, agree, or arrange with any other persons, (a) to limit the facilities for transporting, producing, harvesting, manufacturing, supplying, storing, or dealing in any necessaries; (b) to restrict the supply of any necessaries; (c) to restrict distribution of any necessaries; (d) to prevent, limit, or lessen the manufacture or production of any necessaries in order to enhance the price thereof; or (e) to exact excessive prices for any necessaries, or to aid or abet the doing of any act made unlawful by this section. *Any person violating any of the provisions of this section upon conviction thereof shall be fined not exceeding $5,000 or be imprisoned for not more than two years, or both: Provided, That this section shall not apply to any farmer, gardener, horticulturist, vineyardist, planter, ranchman, dairyman, stockman, or other agriculturist, with respect to the farm products produced or raised upon land owned, leased, or cultivated by him: Provided further, That nothing in this Act shall be construed to forbid or make unlawful collective bargaining by any cooperative association or other association of farmers, dairymen, gardeners, or other producers of farm products with respect to the farm products produced or raised by its members upon land owned, leased, or cultivated by them.*"

It will be observed that the new offense created by the recent amendment of 1919, that is, of making "any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries," is not accompanied by any standard or definition of what is intended by the terms "unjust or unreasonable rate or charge". Nor is there set up in the statute any administrative body charged with the duties of fixing and promulgating just or reasonable rates or charges for necessaries. The duty of deciding what is a just or reasonable rate in every case is thus cast upon the individual, under the penalty of be-

ing convicted of a felony if his best efforts and most conscientious judgment should fail to accord with the views of a jury afterwards.

I.

The lever law violates the fifth and sixth amendments to the constitution.

It is a fundamental principle not open to dispute that "laws which create crimes, ought to be so explicit in themselves, or by reference to some other standard, that all men, subject to their penalties, may know what acts it is their duty to avoid" (Mr. Justice Washington in *United States* v. *Sharp*, Peter C. C. 118, 122). See also *United States* v. *Reese*, 92 U. S. 214, 220; *United States* v. *Brewer*, 139 U. S. 278, 288; Bishop on Statutory Crimes, 3rd ed., sec. 41. There can be no question that it was in the light of this principle that the constitutional guaranty embodied in the Sixth Amendment was written, entitling an accused person "to be informed of the nature and cause of the accusation". Perhaps nothing was more abhorrent to the framers of the Constitution than the English doctrine of constructive crimes and the entrapment of innocent persons by vague penal laws through the medium of judicial interpretation. An eminent jurist and contemporary of the framers of the Constitution has left a striking evidence of this fact. In 1822 Edward Livingston presented to the Louisiana legislature his famous

Report on the Plan of a Penal Code.* Referring to the system of criminal law in England in the eighteenth century, he said (Works of Edward Livingston on Criminal Jurisprudence, Chases ed. 1873, vol. I, pp. 12, 170):

> "This dreadful list [of offenses] was increased by the legislation of the judges, who declared acts which were not criminal under the letter of the law, to be punishable by virtue of its spirit. The statute gave the text, and the tribunals wrote the commentary in letters of blood; and extended its penalties by the creation of constructive offenses. The vague, and sometimes unintelligible language, employed in the penal statutes; and the discordant opinions of elementary writers, gave a colour of necessity to this assumption of power; and the English nation have submitted to the legislation of its courts, and seen their fellow subjects hanged for constructive felonies; quartered for constructive treasons; and roasted alive for constructive heresies, with a patience that would be astonishing, even if their written laws had sanctioned the butchery. . . .
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> "What the law forbids, is an offense; but the law cannot forbid without being perfectly intelligible . . . An ambiguous penal law is no law; and judicial decisions cannot explain it without usurping authority which does not belong to them."

And Macaulay in his famous Report upon the Indian Penal Code among other pertinent remarks declared (4 Misc. Works at p. 170):

> "That a law, and especially a penal law, should be drawn in words which convey no meaning to the people who are to obey it, is an evil. On the other hand, a loosely-worded law is no law, and to whatever extent a legislature uses vague expressions, to

*The authority of Edward Livingston as one of the great jurists of the world is indisputable. La Législation Criminelle de Livingston has long been a standard work on criminal law in France. Macaulay repeatedly acknowledged his debt to Livingston's reports, and spoke of him as "high authority" in connection with the Indian Penal Code (Notes on Indian Penal Code).

> that extent it abdicates its functions, and resigns the power of making law to the courts of justice."

But whatever may be permissible in England or elsewhere, under the Constitution of the United States no law-making power whatever can be devolved upon the courts, for it is provided that "all legislative powers . . . granted shall be vested in a Congress," etc.

It is submitted, therefore, that it is essential to the validity of the penal statute under consideration that its prohibition shall have definiteness and certainty; and these qualities it cannot have unless the ordinary significance and effect of the statutory term "unjust or unreasonable rate or charge" is "perfectly intelligible", as Livingston expressed it, or "so explicit . . . that all men . . . may know what acts it is their duty to avoid," as Mr. Justice Washington declared. The inquiry must, consequently, resolve itself into the question, Is there any reasonable test or standard by which all men may know beforehand what is an "unjust or unreasonable rate or charge"? Some of the suggested tests or standards may now be considered.

It has been suggested that the test or standard is the amount of *profit* made in a given transaction. But the statute is wholly silent upon the subject of profits. Its prohibition is not against unjust or unreasonable *profits*, but solely against unjust or unreasonable *rates* or *charges*. Accordingly, several courts have ruled that sales without profit, or even at a loss, may violate the law! Thus, District Judge Connor of the Eastern District of North Carolina declared in *United States* v. *Myatt*, 264 Fed. 442, 450, that—

> "The statute does not declare it unlawful to make an unjust or unreasonable *profit* upon sugar. The

profit made is not the test, and may be entirely irrelevant to the guilt of the defendant. He may, within the language of the statute, make an unreasonable and therefore unlawful, 'rate or charge' without making any profit, or the rate or charge made may involve a loss to him upon the purchase price."

It would, indeed, be entirely within the literal meaning of the language of the statute for a juror to hold that a very low price was unjust or unreasonable. He might reason that such a transaction or "cut-rate," as it is called, was prejudicial to the public interests, and that, if continued by the same trader or others, its natural tendency and ultimate result would be to drive other traders in the particular commodity out of business, and thus, in the end, bring about unduly high prices, because only a few competitors could remain in the field.

Again, it has been suggested that the profit earned by the individual is not the test, but that the price must be one that will afford a fair profit *in general* in the particular trade or business (Hand, D. J., in charging a grand jury). But, if a trader based his charges upon that theory, and, because he had bought cheaply long before, earned a large profit, there is nothing in the act which would prevent a jury from finding such an individual guilty, because they regarded the profit as "unjust or unreasonable."

Nor is there any escape from the vagueness of the act in recourse to any particular *percentage* of profit. No matter what rate be chosen, a juror may believe it unjust. Again, under this test, an individual who had bought several articles of the same nature at different times and at different prices, would have to offer them at different prices, even though he put them up for sale at the same

moment. Obviously, the public might regard it as wholly unjust or unreasonable that identical articles lying upon one counter at the same time should be the subject of different prices, and quite plainly none would be sold except the cheapest. Nevertheless, District Judge McCall of the Western District of Tennessee, in a charge to a grand jury, stated that if a shoe dealer had bought two lots of exactly the same kind of shoes at different times and at different prices, the first lot at eight dollars per pair and the second lot after the price had gone up to twelve dollars per pair, "and then he sells both lots of those shoes at eighteen dollars, he is profiteering clearly upon the first lot that only cost him eight dollars. Now, he does that upon the theory that if he sells these shoes out and goes into the market and buys again he will have to pay the higher price, but that doesn't excuse him. He is entitled to make a reasonable profit, but he certainly hasn't the right to take advantage of the former low purchase and take the same profit on them that he gets on the twelve dollar shoes." On the other hand, District Judge Holmes of the Southern District of Mississippi has declared that—

> "Although you may consider the price he paid along with the other evidence, you should consider also, and I think should give more weight to, the replacement value of the article than to the original cost."

The basis upon which any given rate of profit should be calculated is also a fertile source of danger and dispute. The cost price may be regarded as too high and, therefore, unjust or unreasonable as a basis.

The right of an individual to compute his profit with reference, not to any single transaction, but to the

business as a whole over a period of a year, or a season, or a month, has been widely disputed in every aspect. A jury may find a particular sale to be criminal because, by itself, it showed a large profit, while that profit might in fact be wholly offset and exceeded by the preceding losses of the business of the month, season, or year. Where many sales and dealings in different lines of articles make up a business, it is all but inevitable that such a state of affairs should constantly come about.

There is likewise no protection in selling at the *market price*. Where one has bought cheaply and the market price has subsequently advanced, it involves the risk of committing a felony to sell the property at the current rate.[1] The possible large profit involved in such an act may seem to a jury unjust or unreasonable. District Judge Howe, in charging the jury in *United States* v. *Leonard* in the Northern District of New York, told them that they were to consider "what prices the defendants paid for the goods . . . *but not how much the market price had advanced from the time the goods were purchased to the time they were sold.*" Indeed, it is everybody's knowledge that the efforts of the Government under the statute in question are being directed towards preventing persons from securing the market price for their wares. It is the Government's contention that the statute was called into existence precisely because the market prices were too high. Therefore, a defendant is guilty of this new crime if he sells at the current market rate, even though he has done nothing towards fixing

[1] See, for example, *United States* v. *Eisenblum*, 264 Fed. 578, where an individual was indicted for selling sixty pounds of sugar at twelve and a half cents a pound, a price that would have been considered cheap almost anywhere else in the country at the time.

that rate nor consulted with any one about it. Indeed, if he did so consult with his fellow tradesmen, no one can doubt that he would be indicted for conspiracy as well as for profiteering.

Even a price fixed by an administrative commission has evoked threats of prosecution (*Detroit Creamery Co. v. Kiewster*, 264 Fed. 845, 846), and a United States Attorney has declared that a sale at public auction might constitute a violation of the law.

Curious and oppressive situations may readily come about under the terms of the statute. Thus, for example, a trustee may be surcharged by the court for failing to secure a particular price upon disposing of the trust property, when, if he had thus sold, a jury would convict him as a profiteer. An agent selling at a price fixed by his principal may be convicted because, although he knew nothing about it, his principal had bought cheaply and was thus realizing a large profit; while another jury might acquit the principal because it deemed the price paid to him to be no more than others were getting. Indeed, not even a receiver conducting a business, or selling a piece of property to the highest bidder at a public sale, would be immune from conviction, if the prices he procured were more than a jury deemed just or reasonable. And the gravest iniquity of all lies, not alone in the fact that one jury may convict for the same act for which another jury may acquit, but in the fact that each of the jurors who concur in a conviction may arrive at his conclusion upon grounds entirely at variance with those of every other of his colleagues, so that, even after a trial and conviction, it would be impossible for their views (if the defendant could somehow have the benefit of them) to

serve any useful purpose in guiding and directing his future conduct.

The statute also leaves it in doubt whether the rate or charge must be just to the buyer or just to the seller or just to both. A tradesman who deals with rich and poor customers may believe it just to sell more cheaply to the latter, but a jury might convict him for not treating all alike; and, on the other hand, there is nothing in the enactment to prevent another jury from finding a charge unjust because it does not give consideration and regard to the means, condition and ability to pay of different classes of buyers.

The just or reasonable rate of to-day, or, indeed, of an hour ago, may be the basis of a conviction for felony if continued in force another day or another hour. The statute affords not even a single moment of security and repose. It is a strange commentary on the enactment in question that in one breath (see section 6) it forbids hoarding of necessaries under grave penalties and thus forces a tradesman to make sales, while in the next it lays his *every* act of selling under the dire threat of a prosecution for an infamous crime. And the terrifying extent of this threat will be better appreciated when it is realized that the enactment covers *all necessaries*—all that we eat, wear, use, burn, etc., etc.

The statute remits to the jury also all the mooted questions of cost accounting. The proper elements of overhead expenses, the extent to which each may be allowed in a given case and in respect of a single transaction, and the multitude of other factors which enter into modern business accounting science. It is not enough that the defendant has dealt with these questions in a

usual or scientific, or even in the most accepted, manner; the jury may deem justice and reasonableness to be on the other side, and no one can do more than hazard a guess as to the outcome.

It has been said that it is the *real or true value* only which one may charge. But what is that and how is it to be arrived at? The statute does not say; and as it is not the market value and may not result in a profit or in a loss, where does it exist as a fact? Manifestly the *real or true value* is as completely a matter for conjecture and speculation by juries as would have been the statutory crimes which this court invalidated for indefiniteness in *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, and *Collins* v. *Kentucky*, *id.* 634, where the statutes in question attempted to allow juries to speculate upon the question of whether a given combination did or did not raise prices above the "real value," at the risk of the defendant's liberty and property.

It is, therefore, submitted that the statute places the guilt or innocence of ordinary business transactions entirely in the field of conjecture. Indeed, there is no transaction involving a rate or charge, which may not be seized upon by a jury to convict. Whether it result in a profit or a loss the jury may, nevertheless, deem it unjust or unreasonable. There is no ordinary act of merchandising in necessaries which a jury may not, if it please, challenge as unfair or unreasonable under the statute in suit; and the plain practical effect of the statute is to leave all business in necessaries wholly at the mercy of the whim or caprice of prosecuting officers and juries.

It is indisputable that statutes, and especially criminal statutes, must be considered in the light of their

natural operation and practical effect (*Bailey* v. *Alabama*, 219 U. S. 219, 244); and, so considered, it is plain that the statute now before the court carries a threat of prosecution and conviction whenever necessaries are sold or handled. The case is, therefore, plainly not like the one before the court in *Nash* v. *United States*, 229 U. S. 373, where, as was subsequently pointed out in *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, 223, there were two perfectly obvious extremes—"the obviously illegal and the plainly lawful"—within which the ordinary man might safely keep. Under the Lever Law there is no "plainly lawful" course open to an individual. He may not hoard; he must sell; and if he does sell, he may be convicted because some jury may be dissatisfied with *any* price he may receive upon *any* sale. Such a state of affairs is mere terrorism, not law. It presents in fact a situation even worse than that which Mr. Chief Justice Waite had in mind when he said in *United States* v. *Reese*, 92 U. S. 214, 221:

> "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government."

In the case at bar it is not open even to the court to say who shall be detained and who shall be set at large, but the whole matter is left to the untrammelled will of the jury. The evils to be apprehended from judicial legislation are enormously exceeded and intensified by this new instrument of tyranny and oppression—irresponsible, inconsistent and secret *jury legislation* and condemnation in and by one and the same act.

The statute is, in final analysis, the same in substance and effect as the provision of the Chinese Penal Code to which Mr. Justice Brewer referred in *Chicago & N. W. Ry. Co.* v. *Dey*, 35 Fed. 866, 876, namely:

> "Whoever is guilty of improper conduct, and of such as is contrary to the spirit of the laws, though not a breach of any specific part of it, shall be punished at least forty blows; and when the impropriety is of a serious nature, with eighty blows."

And this aspect fully justifies the stringent criticism visited upon the statute, and any system of jurisprudence which would sustain it, in the following passage from the opinion of District Judge Faris in one of the cases at bar (*United States* v. *L. Cohen Grocery Co.*, 264 Fed. 218, 223):

> "If this law is to stand, then no longer would there seem need of defining crimes by separate statutes. All that will be necessary will be to pass a single sweeping statute, declaring that any person who shall commit any unjust or unreasonable act, or a wrongful or criminal act, shall be deemed guilty of a felony, and leave it to the jury to determine what is unjust, or unreasonable, wrongful, or criminal."

The foregoing reasons, *inter alia*, have led a number of the lower federal courts to the conclusion that the statute under discussion is unconstitutional. *United States* v. *L. Cohen Grocery Co.*, 264 Fed. 218; *Detroit Creamery Co.* v. *Kinnane*, 264 Fed. 845; *Lamborn* v. *McAvoy*, 265 Fed. 944; *A. T. Lewis & Son Dry Goods Co.* v. *Tedrow*, D. C. Col., Lewis, D. J., April 9, 1920; *United States* v. *Bernstein*, D. C. Neb., Woodrough, D. J., June 8, 1920; *United States* v. *People's Fuel Co.*, D. C. Ariz., Dooling, D. J., etc.

In passing upon a demurrer to an indictment in the case of the *Cohen Grocery Co., supra*, District Judge Faris said (264 Fed. at pp. 220, 223):

> "This statute makes it a felony for any person—which, I take it, includes a corporation as well—willfully to make any unjust or unreasonable charge in dealing in any necessary. It nowhere defines what is unjust or what shall be deemed unreasonable. It leaves it to the jury to find what particular thing it is that the law has made a felony of. One jury might very well say that a profit or charge of one cent a pound on sugar, above cost and carriage, is unjust and unreasonable, and so a felonious act; while another jury might say that a charge of 25 cents was not unjust and unreasonable. No criminal statute, gentlemen, ought to be so vague and uncertain as that the citizen cannot at any given moment know whether he is a felon or a patriot. . . . .
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> "No man would engage in business, and no self-respecting man would remain in business, if his fortune, good name, or liberty is to be determined solely by the heated and prejudiced views of what is unjust and unreasonable, which may be entertained by a jury personally embarrassed and harassed, it may be, by the inordinate rise in prices of all commodities. Such a law may be fit for the trial of the guilty; but laws ought to be fit both to try the guilty and the innocent. A law which is fit only to try those who are guilty necessarily begs the question of guilt, and is therefore no better than lynch law.
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> "The definitions, boundaries, and limits of a criminal statute ought, at least, to be so clear that no man in his right mind can be in doubt when he is violating and when he is not violating such statute. There ought not to be necessary any chopping of logic or intricate reasoning from cause to effect in order to decide the question of criminality."

In granting a permanent injunction in the *Detroit Creamery Co.* case, *supra*, against the enforcement of the portion of the Lever Law now under consideration, District Judge Tuttle declared (264 Fed. at p. 850):

"It seems clear that an indictment which, following the language of this statute, charged a person with merely having made an 'unjust' or 'unreasonable' rate or charge in handling or dealing in or with any necessaries, would be wholly insufficient to inform such person of the nature and cause of the accusation thus made.

"Such an indictment, however, could not specify the offense thus charged with any more detail, for the reason that the statute purporting to create such offense does not state the facts, acts, or conduct necessary to constitute the crime denounced. What is an unjust rate or an unreasonable charge? In determining this question, what elements are to be taken into consideration? What is the test, or standard, or basis which is to be used in attempting to ascertain whether this statute has been violated? The statute itself furnishes no assistance in the way of answering this question. Is the reasonableness or justice of a rate to be determined by the amount of profit derived therefrom? If so, what percentage of profit from the business of selling a certain article makes the rate or charge in handling or dealing in that article unreasonable, and therefore unlawful and criminal? If such profit is derived from a business devoted to the sale of several kinds of articles, how is the portion of such profit properly chargeable to each of such articles to be determined, so that the person engaging in such business may know whether or not he is a criminal? What elements enter into the question whether any particular charge is just or unjust, reasonable or unreasonable? What relation to the reasonableness of a rate have the cost of labor, the cost of machinery and of raw material, the cost of overhead charges, and the other expenses of production? How is the amount properly chargeable to these expenses to be fixed and ascertained? To what extent are differences in market conditions in different places to be considered? Is the existence or absence of competition to be taken into account? Is any allowance to be made for losses and misfortunes which affect costs and profits? To whom must a rate or charge be unjust, to be 'unjust' within the meaning of this statute? Is it the effect which a

rate or charge has upon the seller, or which it has on the purchaser, which renders it reasonable or unreasonable?

"These and other questions which readily suggest themselves naturally and perhaps necessarily enter into a consideration of the nature of the proper test or standard by which the criminality of any act under this statute must be determined. To the statute itself we look in vain for answers to any of such questions. It furnishes no means for the guidance of courts, juries, or defendants in determining when or how the statute has been violated. No standard or test of guilt has been fixed. We are left to the uncontrolled and necessarily conjectural judgment, or rather conclusion, of each particular jury, or perhaps court, before which the accused in any given case may be on trial for his liberty. Making, as it does, the question of guilt dependent upon this mere conclusion or opinion of the court or jury as to whether the rate or charge involved be just or unjust, reasonable or unreasonable, I cannot avoid the conclusion that this statute is too vague, indefinite, and uncertain to satisfy constitutional requirements or to constitute due process of law."

And in similarly disposing of the case of *Lamborn* v. *McAvoy*, 265 Fed. 944, 948, District Judge Thompson spoke in part as follows:

"The present statute leaves it open to the jury to determine whether it is unreasonable or unjust to make the rate or charge for necessaries, depending upon any number of undefined circumstances which may enter into the transaction. It leaves it uncertain, for instance, whether a man may lawfully base the price of his commodity upon a profit over the original price he paid for the identical article sold, whether he may lawfully make a price based upon general market conditions, whether he may make a profit based upon the average cost of a number of similar purchases, whether his selling price may be based upon the cost he would have to incur to replace the merchandise, and in general the jury may speculate as to any line of conduct, whether it

would or would not justify a rate or charge, in determining whether it was unjust or unreasonable.

"While in the *Standard Oil Case*, 221 U. S. 1, and the *American Tobacco Co. Case*, 221 U. S. 106, the rule of reason was applied to limit the application of the Sherman Act as follows:

'Thus not specifying, but indubitably contemplating and requiring, a standard, it follows that it was intended that the standard of reason, which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided'

—in the statute now under consideration there is no standard of reason upon which a jury could find the conduct of the accused to be unreasonable or unjust which had been applied at the common law and in this country, but the entire question of the guilt or innocence of the accused is to be determined upon the opinion of a jury whether the conduct of the accused has been unjust or unreasonable."

In sustaining a demurrer to an indictment, District Judge Dooling for the District of Arizona, ruled in the case of *United States* v. *People's Fuel & Feed Co.* (not yet reported), as follows:

"The guilt or innocence of an individual under [the statute in question] is not made to depend upon standards fixed by law, but upon what a jury might think as to the justice or injustice, the reasonableness or unreasonableness, of rates or charges made by him in handling or dealing with necessaries.

"I cannot forecast the action of other courts, but it is my own firm conviction that no one should be put upon trial for an offense so vaguely defined, for an act the criminality of which he has no possible means of measuring in advance, depending not at all upon his own intent to violate the law, but wholly upon the opinion of a jury, based on instructions by a court which is itself without guide or compass, and

> where all concerned, defendant, counsel, Government, court, and jury, may well be at cross-purposes, no one knowing what is just or what is reasonable, and all disagreeing as to the method by which what is just or reasonable may be, if indeed it can ever be, legally ascertained."

It cannot be denied that the actual effect and operation of the statute in suit is, as District Judge Woodrough declared in *United States* v. *Bernstein* (D. C. Neb., not yet reported), to leave the vital question of "the fairness of the price . . . to be determined, [not] by the processes of commerce operative at the time, but by the *ex post facto* inquiry of the jury."

Such a statute as the one at bar falls within the condemnation of a long line of authorities. *International Harvester Co.* v. *Kentucky*, 234 U. S. 216; *Collins* v. *Kentucky*, *id.* 634; *United States* v. *Pennsylvania R. R. Co.*, 242 U. S. 208, 237-8; *United States* v. *Reese*, 92 U. S. 214; *Louisville & Nashville R. R. Co.* v. *Railroad Com.*, 19 Fed. 679, 691; *Chicago & N. W. Ry. Co.* v. *Dey*, 35 Fed. 866, 876; *Tozer* v. *United States*, 52 Fed. 917, 919-20; *Hocking Valley Ry. Co.* v. *United States*, 210 Fed. 735, 743; *Czarra* v. *Board of Medical Examiners*, 25 App. D. C. 443, 450; *United States* v. *Capital Traction Co.*, 34 App. D. C. 599; *Louisville & Nashville R. R. Co.* v. *Commonwealth*, 99 Ky. 132; *Commonwealth* v. *S. C. &c. St. R. R. Co.*, 181 Ky. 449, 469; *Ex parte Jackson*, 45 Ark. 158, 164; *Railroad* v. *People*, 77 Ill. 443.

In *Louisville & Nashville R. R. Co.* v. *Railroad Commission*, 19 Fed. 679, 691, the court of three judges said:

> "The complainant insists that the act is too indefinite to sustain a suit for the penalties therein imposed, the offenses for which said penalties are to be inflicted not being sufficiently defined. The

definition of the two principal of these offenses, is,—*First*, the taking of 'unjust and unreasonable compensation;' and, *secondly*, the making of 'unjust and unreasonable discriminations.' But what is unjust and unreasonable compensation, and unjust and unreasonable discrimination? And can an action, *quasi* criminal, be predicated thereon? It was expressly held to the contrary in the case of *Cowan* v. *East Tenn., V. & G. R. Co.*, decided a few years since, at Knoxville, (but not reported,) because, as the learned judge said, 'it would have to be left to a jury, upon the proof, to say whether the difference' in the rates 'was discrimination or not,' and that the same difference 'might in one instance be held a violation of the law and in another not,' thus making the guilt or innocence of the accused dependent upon the finding of the jury, and not upon a construction of the act. 'This,' he said, 'I think cannot be done.' If this decision is authoritative, it is conclusive of this part of this case. We think the decision clearly right. Questions as to what is a reasonable time for the performance of a contract, or reasonable compensation for work and labor done by one man at the request of another without any stipulation as to the price to be paid, and other like cases, frequently arise in civil controversies. But the law furnishes, in all such cases, a *standard* of compensation for the guidance of the jury. Without such legal standard there could be no reasonable approximation to uniform results; the verdicts of juries would be as variant as their prejudices, and this could not be tolerated. To thus relegate the administration of the law to the unrestrained discretion of the jury; to thus authorize them to determine the *measure* of damages and then assess the amount to which a plaintiff may be entitled, would inevitably lead to inequalities and to injustice."

And in the cases of *Chicago & N. W. Ry. Co.* v. *Dey*, 35 Fed. 866, 876, and *Tozer* v. *United States*, 52 Fed. 917, 919-20, Mr. Justice Brewer twice ruled to the same effect.

The question was elaborately considered in the case

of *Louisville & Nashville R. R. Co. v. Commonwealth*, 99 Ky. 132, where the court wrote as follows:

> "That this statute leaves uncertain what shall be deemed a 'just and reasonable rate of toll or compensation' cannot be denied; and that different juries might reach different conclusions on the same testimony, as to whether or not an offense has been committed, must also be conceded. The criminality of the carrier's act, therefore, depends on the jury's view of the reasonableness of the rate charged. And this latter depends on many uncertain and complicated elements. That the corporation has fixed a rate which it considers will bring it only a fair return for its investment does not alter the nature of the act. Under this statute it is still a crime, though it cannot be known to be such until after an investigation by a jury, and then only in that particular case, as another jury may take a different view, and, holding the rate reasonable, find the same act not to constitute an offense. There is no standard whatever fixed by the statute, or attempted to be fixed, by which the carrier may regulate its conduct. And it seems clear to us to be utterly repugnant to our system of laws to punish a person for an act, the criminality of which depends, not on any standard erected by the law, which may be known in advance, but on one erected by a jury; and especially so as that standard must be as variable and uncertain as the views of different juries may suggest, and as to which nothing can be known until after the commission of the crime.
>
> "If the infliction of the penalties prescribed by this statute would not be the taking of property without due process of law, and in violation of both state and Federal Constitutions, we are not able to comprehend the force of our organic laws."

The undiminished force and persuasiveness of this reasoning was recently recognized by this court in *United States v. Pennsylvania R. R. Co.*, 242 U. S. 208, 237-8, where Mr. Justice McKenna said:

> "Again, it is charged that the order expressed but a legislative principle, has the generality of such

principle without any criterion of application. The order requires the company to 'provide . . . upon reasonable request and reasonable notice, at complainants' respective refineries, tank cars in sufficient number to transport said complainants' normal shipments in interstate commerce.' What is a reasonable request or reasonable notice, and what are normal shipments? The order affords no answer and if the railroad company ventures, however honestly, any resistance to a request or notice not deemed reasonable or to shipments not deemed normal it must exercise this right at the risk of a penalty of $5,000 a day against all of its responsible officers and agents. These considerations are very serious (*International Harvester Co.* v. *Kentucky*, 234 U. S. 216; *Collins* v. *Kentucky*, 234 U. S. 634), but the view we have taken of the power of the Commission to make the order, however definite and circumscribed it might have been made, renders it unnecessary to pass upon the contentions."

Under the statute involved in the cases at bar the menace is even greater than that commented upon in the preceding quotation. The ordinary business man is now permitted to sell necessaries solely at the risk of being condemned as a felon and sentenced to imprisonment for two years and fined $5000 in respect of every one of the scores of sales he makes and must make every day. Manifestly, the penalties threatened by this act operate *in terrorem* upon the mind of the plain man, even if they were not indeed so intended to operate in order to compel compliance with unwarranted demands of government officials determined to depress prices by any means. The validity of the penalty provisions of the statute is, therefore, quite doubtful. *Ex parte Young*, 209 U. S. 123, 147; *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331, 337.

Nothing inconsistent with the foregoing views was decided by this court in *Waters-Pierce Oil Co.* v. *Texas*, 212

U. S. 86; *Nash* v. *United States*, 229 U. S. 373; *Miller* v. *Strahl*, 239 U. S. 426; *Fox* v. *Washington*, 236 U. S. 273, and *Omaechevarria* v. *Idaho*, 246 U. S. 343. This was expressly recognized in the *Waters-Pierce Co.* case, *supra*, where the court, after referring to rule laid down in the the cases of *Tozer* v. *United States*, 52 Fed. 917; *Railway Co.* v. *Dey*, 35 Fed. 866, and *Louisville and Nashville Railway* v. *Commonwealth*, 99 Ky. 132, (discussed above), carefully distinguished those cases from the one then before it in the following language (212 U. S. at p. 109):

> "But the Texas statutes in question do not give the broad power to a court or jury to determine the criminal character of the act in accordance with their belief as to whether it is reasonable or unreasonable, as do the statutes condemned in the cases cited."

The *Nash* case, 229 U. S. 373, relied on by the Government, deals with the criminal provisions of the Sherman Anti-Trust Law, which, as construed by this court, prohibited undue restraints of trade in interstate commerce. While the language of the enactment there in question did not categorically set forth all the particular acts to which it applied, it did so in effect by reference to and adoption of the well-established common law rules governing restraints of trade. These defined the prohibited acts with sufficient precision to enable ordinary men to regulate their conduct so as to avoid violating the law. An individual who desired to be quite safe from prosecution under the Sherman Law had a clear course open to him—he need not monopolize or restrain interstate trade at all. If, nevertheless, he chose to embark upon a course of monopoly or restraint of trade, he had a long settled and well developed body of law to guide him. But in the cases at bar there is no common law rule for determining

the question. The crime created in the Lever Law is entirely novel. And there is, in addition, no safe course whatever open to dealers in necessaries. "If business is to go on, men . . . must sell their wares" (*International Harvester Co. v. Kentucky*, 234 U. S. 216, 223), but, notwithstanding this compelling necessity, the statute in question converts *every* sale at *any* price into a possible source of prosecution and conviction thereunder. Such an undefined new crime clearly offends against the principle long ago declared by this court through Mr. Chief Justice Waite in *United States v. Reese*, 92 U. S. 214, 220, as follows:

> "If the legislature undertakes to define by statute a *new* offence, and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime."

In *Miller v. Strahl*, 239 U. S. 426, and *Fox v. Washington*, 236 U. S. 273, also relied upon by the Government, the standard of conduct imposed by the statutes in question was also rendered certain and clear by reference to well-recognized rules of the common law; and in the *Miller* case, moreover, the constitutional question here raised was not involved, since it was not a criminal proceeding.

Omaechevarria v. Idaho, 246 U. S. 343, involved the validity of a statute forbidding sheep to graze "upon any range usually occupied by any cattle grower," etc. It was challenged as void for indefiniteness. It appeared, however, that this law had been enacted over thirty years before; and, manifestly, a statute, which had in actual practical operation for so long a period been found by experience to be sufficiently certain, could not at this late day be set aside as too vague for practical administration

and enforcement. An indisputable practical construction demonstrated the contrary. Under the statute involved in the cases at bar, on the other hand, even the short experience since October 22, 1919, discloses that the recent amendment of the Lever Law has produced widespread confusion among the judges and consternation among businessmen, who find it impossible to conduct their affairs under this amendment of the law made in 1919 without running the risk of imprisonment at every turn. Indictments have been procured by United States Attorneys in almost every jurisdiction and practically at will. No businessman is safe; he cannot safely sell at the usual market price, or even at cost with any degree of safety, and the continued operation of the statute makes its meaning no clearer for the future.

II.

THE CLASSIFICATION CONTAINED IN SECTIONS 4 AND 26 OF THE LEVER ACT AS AMENDED VIOLATES THE FIFTH AMENDMENT TO THE CONSTITUTION.

The fourth section of the Lever Act as amended October 22, 1919, contains two provisos which take out of the prohibitory provisions of the law certain classes of individuals and which read as follows:

> "*Provided*, That this section shall not apply to any farmer, gardener, horticulturist, vineyardist, planter, ranchman, dairyman, stockman, or other agriculturist, with respect to the farm products produced or raised upon the land owned, leased, or cultivated by him: *Provided further*, That

> nothing in this Act shall be construed to forbid or make unlawful collective bargaining by any co-operative association or other association of farmers, dairymen, gardeners, or other producers of farm products with respect to the farm products produced or raised by its members upon land owned, leased, or cultivated by them."

The twenty-sixth section of the act deals with persons engaged in interstate commerce, lays them under certain enumerated prohibitions in respect of storing, hoarding and destroying necessaries, etc., similar in character to the prohibitions contained in section 4, and then continues in part as follows:

> "*Provided*, That any storing or holding by any farmer, gardener, or other person of the products of any farm, garden, or other land cultivated by him shall not be deemed to be a storing or holding within the meaning of this Act: *Provided further*, That farmers and fruit growers, co-operative and other exchanges, or societies of a similar character shall not be included within the provisions of this section."

Quite plainly it is the purpose of this statute to place agriculturists and combinations of agriculturists in a favored class and to free them from all the restraints laid upon others dealing likewise in necessaries. In other words, in an enactment whose professed purpose is to conserve food and other necessaries to the end of winning a war, the most important class of all—that which produces all that grows—is left entirely free and unregulated. Of what use is it to say to a baker that he shall not charge an unjust or unreasonable rate for his loaves of bread, if the farmer has already charged him a grossly excessive price for the wheat that must be used to make the bread? It is manifest that prices can never be fair and reasonable

for any finished product, no matter what manufacturers and middlemen may do, if the cost of the raw material is unduly large. It would seem, therefore, that the exceptions referred to are entirely inconsistent with the primary purpose of the law, tend to frustrate it, and are in fact merely arbitrary attempts to set up a favored class. The precise question has been so ruled by District Judge Anderson in the recent case of *United States* v. *Armstrong*, 265 Fed. 683, 691, *et seq.*, where he wrote as follows:

> "The Lever Act is entitled:
>
> 'An act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel.'
>
> "In the first section of the act, 'foods, feeds and fuel' are called necessaries, and the prohibitions are as to necessaries thus defined. By amended section 4 farmers, gardeners, horticulturists, vineyardists, planters, ranchmen, dairymen, stockmen, and other agriculturists—persons who produce foods and feeds—with respect to the products produced or raised upon land owned, leased, or cultivated by them, may willfully destroy such foods and feeds for the purpose of enhancing the price or restricting the supply thereof, may knowingly commit waste or willfully permit preventable deterioration of such foods and feeds in or in connection with their production, manufacture or distribution, may hoard such products, may monopolize or attempt to monopolize such products, may engage in any discriminatory and unfair, or any deceptive or wasteful practice or device, or may make any unjust or unreasonable rate or charge in handling or dealing in or with such products, and may conspire, combine, agree, or arrange with any other person to limit the facilities for producing, or to restrict the supply, or to restrict the distribution, or to prevent, limit, or lessen the

production in order to enhance the price, or exact excessive prices for such products, with impunity, while all other persons are to be punished as criminals for doing the same acts, including those who produce, supply, or distribute the other necessary, fuel. The section so provides notwithstanding the fact that the excepted and the included persons are all in the same general class; that is, they are all alike engaged in producing, handling, and distributing necessaries—foods, feeds, and fuel. The constitutional warrant for this legislation is found in the grant of power to Congress to declare war, to raise and support armies, and to provide and maintain a navy. Those who produce foods to feed the soldiers and sailors, those who produce feeds to feed the horses and mules required by the army, and those who produce fuel to transport the soldiers and propel the ships of the navy, are all alike helping to win the war, and are all alike in the same general class.

"The second proviso in amended section 4, that 'nothing in this act shall be construed to forbid or make unlawful collective bargaining by any cooperative association or other association of farmers, dairymen, gardeners, or other producers of farm products with respect to the farm products produced or raised by its members upon land owned, leased, or cultivated by them,' is as unwarranted as the one just considered. The indulgence to the excepted class is in respect to the farm products produced or raised upon land owned, leased, or cultivated by the members of it. But this does not differentiate the instant case from the *Connolly Case*, for there the exception was to apply to 'agricultural products or live stock while in the hands of the producer or raiser.' My conclusion is that the classification in amended section 4 is arbitrary and not natural or reasonable; that such section is repugnant to the 'due process' clause of the Fifth Amendment, and is therefore void. . . .

"Section 26 deals with persons carrying on or employed in commerce among the several states, in any article suitable for human food, fuel, or other

necessaries of life, and it prohibits the storing, acquiring, holding, or destroying of any such article for the purpose of limiting the supply thereof to the public or affecting the market price thereof in such commerce. The first proviso exempts farmers, gardeners, and other persons as to the products of land cultivated by them, and is objectionable for the same reasons given above in considering a similar exception in amended section 4.

"The second proviso, 'that farmers and fruit growers, co-operative and other exchanges, or societies of a similar character shall not be included within the provisions of this section,' carves out an excepted class for which no reasonable basis can be seen. This proviso is not limited to the necessaries produced by the excepted class, but it applies to farmers, fruit growers, co-operative and other exchanges, or societies of a similar character, without reference to where or by whom the necessaries are produced. These persons are set apart as a favored class, and are given the privilege of storing, acquiring, holding, or destroying necessaries for the purpose of limiting the supply thereof to the public or affecting the market price thereof in interstate commerce, without any restraint whatever, while all other persons who commit such acts are to be punished as criminals. It is arbitrary legislation and cannot stand. Section 26 is therefore void."

The case of *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, to which District Judge Anderson refers in the foregoing extract from his opinion, is a direct authority in point. This court there had under review an Illinois anti-trust law which forbade combinations and conspiracies to prevent competition, fix prices or restrain production, but, nevertheless, attempted to make the following exception from the field of operation of the statute, namely, that—

> "The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser."

This court held the enactment unconstitutional and void because of this attempt to create a favored class without justification or reason. Mr. Justice Harlan, speaking for the court, said (at pp. 563-4):

> "It may be observed that if combinations of capital, skill or acts, in respect of the sale or purchase of goods, merchandise or commodities, whereby such combinations may, for their benefit exclusively, control or establish prices, are hurtful to the public interests and should be suppressed, it is impossible to perceive why like combinations in respect of agricultural products and live stock are not also hurtful. Two or more engaged in selling dry goods, or groceries, or meats, or fuel, or clothing, or medicines, are under the statute, criminals, and subject to a fine, if they combine their capital, skill or acts for the purpose of establishing, controlling, increasing or reducing prices, or of preventing free and unrestrained competition amongst themselves or others in the sale of their goods or merchandise; but their neighbors, who happen to be agriculturists and live stock raisers, may make combinations of that character in reference to their grain or live stock without incurring the prescribed penalty. Under what rule of permissible classification can such legislation be sustained as consistent with the equal protection of the laws? It cannot be said that the exemption made by the ninth section of the statute was of slight consequence, as affecting the general public interested in domestic trade and entitled to be protected against combinations formed to control prices for their own benefit; for it cannot be disputed that agricultural products and live stock in Illinois constitute a very large part of the wealth and property of that State.
>
> "We conclude this part of the discussion by saying that to declare that some of the class en-

> gaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the State for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill or acts to destroy competition and to control prices for their special benefit, is so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary."

The *Connolly* case is plainly in point and constitutes a direct precedent against the validity of the statute herein involved. It is of unimpaired authority (see *International Harvester Co. v. Missouri*, 234 U. S. 199, 215), and it dealt with an act of the legislature entirely analogous in all substantial respects to that now before the court, despite the fact that there is some difference in phraseology between the statutes.

It is no justification for the classification attempted in the statute in question to say that excepting farmers, etc., tended to encourage production of agricultural products. These products were no more and no less necessary to the winning of the war than coal and thousands of other products not exempted. Moreover, the same contention was presented to the court in the *Connolly* case and emphatically rejected. If it could not be recognized there, it should certainly not be accepted in respect of an act passed in the exercise of the war power. If it be ever right to leave farmers free to combine against and to profiteer at the expense of their fellow countrymen, it certainly could not be right to leave them at liberty to

do so at the expense of the army and navy and of a citizenry sorely taxed and burdened by a great war.

It cannot be argued that the *Connolly* case is not applicable because it turned upon the equal protection of the law clause of the Fourteenth Amendment, while the cases at bar are concerned solely with the due process clause of the Fifth Amendment. The provision for the equal protection of the law in the Fourteenth Amendment no doubt emphasizes the necessity for proper classification in state legislation, but it does not create this requirement. The due process clause alone would be equally effective for this purpose. McGhee on Due Process of Law, pp. 60-64, 311; 2 Willoughby on the Constitution, pp. 873-4; *United States* v. *Armstrong*, 265 Fed. 683, 690; *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1, 24-5. Indeed, nothing could be deemed a more inherent requirement of due process of law than that the law shall "operate on all alike, and not subject the individual to an arbitary exercise of the powers of government" (*Giozza* v. *Tiernan*, 148 U. S. 657, 662). Where, however, some are freed of restrictions to which others in similar situation are subjected, that is nothing less than "an arbitrary exercise of the powers of government"; it is not a law but an edict, and due process of law has been plainly denied.

The unjust classification attempted in the Lever Act, therefore, renders the sections involved wholly invalid, for, of course, the court cannot nullify the provisos and thereby make the statute uniform in its application.

III.

THE ACT OF OCTOBER 22, 1919, IS VOID BECAUSE THERE IS NOT NOW ANY EXISTING WAR EMERGENCY TO SUSTAIN IT AS A PROPER EXERCISE OF THE WAR POWER OF CONGRESS.

The amendment to the Lever Law on October 22, 1919, is conceded by the Government to be sustainable only if it constitutes a proper exertion of the war power of Congress. It is well settled that an individual engaged in a business not subject to a public interest may sell to whom he pleases and at any price he can get. *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 320; *People* v. *Budd*, 117 N. Y. 1, 15. It is only the existence of a present actual war emergency which warrants Congress in interfering with this right. As stated in the leading case of *Ex parte Milligan*, 4 Wall. 2, 127, "the necessity must be actual and present". See also 2 Willoughby on the Constitution, p. 1251; *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, 162-3; *Ruppert* v. *Caffey*, *id.* 264, 308; *Mitchell* v. *Harmony*, 13 How. 115, 135; *Raymond* v. *Thomas*, 91 U. S. 712, 716; *Milligan* v. *Hovey*, 3 Biss. 13; *In re Egan*, 5 Blatchf. 319; *McLaughlin* v. *Green*, 50 Miss. 453; *Johnson* v. *Jones*, 44 Ill. 142, 154; *Griffin* v. *Wilcox*, 21 Ind. 370; *Nance & Mays* v. *Brown*, 71 W. Va. 319, 324.

It is, therefore, material to inquire only whether any actual war emergency exists at present, nearly two years after the Armistice. It is, indeed, of no consequence that in August, 1917, when the original Food Control Law was passed, or even on October 22, 1919, when it was

amended, there was an actual war emergency confronting the Nation. "As necessity creates the rule, so it limits the duration" thereof (*Ex parte Milligan*, 4 Wall. 2, 127), and wartime legislation, depending, as it does, upon the existence of a present emergency, cannot be permitted to remain in force and effect beyond the time of emergency. For it must be obvious that any other rule would enable Congress, by merely refraining from the repeal of such enactments, indefinitely to prolong the interference of the Federal Government with individual and state rights, long after there had ceased to be any warrant therefor. Wartime legislation is, consequently, an excellent example of that species of legislation which, though constitutional when enacted, thereafter becomes invalid by mere efflux of time whenever its sustaining cause has disappeared. See *Johnson* v. *Gearlds*, 234 U. S. 422, 446; *Perrin* v. *United States*, 232 U. S. 478, 486; *Municipal Gas Co.* v. *Public Service Com.*, 225 N. Y. 89, 95-97; *Castle* v. *Mouse*, 91 Okla. 81, 206, 303. The nature and duration of the war power were aptly described by Mr. Justice McReynolds in the dissenting opinion in the recent case of *Rupert* v. *Caffey*, 251 U. S. 264, 308, as follows:

> "The power of Congress recognized in the *Hamilton Case*, and here relied upon must be inferred from others expressly granted and should be restricted, as it always has been heretofore, to actual necessities consequent upon war. It can only support a measure directly relating to such necessities and only so long as the relationship continues. Whether these essentials existed when a measure was enacted or challenged, presents a question for the courts."

There is no war emergency now existing which warrants the continued existence and enforcement of this legislation affecting all private business in necessaries of every kind and description and interfering with the affairs of virtually every individual engaged in trade. Even the slight evidence of emergency which the court was able to adduce in disposing of the cases of *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, 161-2, and *Ruppert* v. *Caffey*, *id.* 264, has disappeared, and now there is no war or wartime condition anywhere in the land, and all that remains is the fiction of a *de jure* state of war. The merchants on whose behalf this brief is submitted buy and sell coal. Perhaps no industry has been longer under war regulation than this, yet on March 19, 1920, the President issued an executive order, effective April 1, 1920, which discontinued this regulation and control, and which declared:

> "I have concluded that it is not expedient for me to exercise any such price fixing control so that on and after April 1st, 1920, no government maximum prices will be in force. There is at present no provision of the law for fixing new coal prices for peace time purposes, and unless and until such grave emergency shall arise, which in my judgment has a relation to the emergency purposes of the Lever Act, I would not feel justified in fixing coal prices with reference to future condition or production."

It must needs be patent to all, as it is in fact indisputable, that demobilization of the army and navy has been completely accomplished; that the United States has dismissed its various war boards for the control of the country's industries; that the "national security and defense" have long since ceased to require drastic war legislation.

and that the Nation has been fully restored to a peace basis. Nothing remains but a mere technical state of war which may continue indefinitely. The legislative power of Congress authorizes only such laws as are "necessary and proper" to carry into execution the delegated powers, and, under conditions as they now exist, no actual war necessity or emergency calls for or justifies the stringent provision contained in the act of October 22, 1919, which declares it to be a felony for an individual handling or dealing in necessaries to charge an unjust or unreasonable price.

The question here presented is plainly a judicial question. Otherwise Congress would be the sole judge of the extent of its war powers and could exercise them at will and as despotically as it pleased, and in time of peace as well as in war. Mr. Chief Justice Chase disposed of an analogous contention in *Hepburn v. Griswold*, 8 Wall. 603, 617, as follows:

> "It is said that this is not a question for the court deciding a cause, but for Congress exercising the power. But the decisive answer to this is that the admission of a legislative power to determine finally what powers have the described relation as means to the execution of other powers plainly granted, and, then, to exercise absolutely and without liability to question, in cases involving private rights, the powers thus determined to have that relation, would completely change the nature of American government. It would convert the government, which the people ordained as a government of limited powers, into a government of unlimited powers. It would confuse the boundaries which separate the executive and judicial from the legislative authority. It would obliterate every criterion which this court, speaking through the venerated Chief Justice in the case already cited [*McCulloch v. Maryland*, 4 Wheat. 316], established for the determination of the question

whether legislative acts are constitutional or
constitutional."

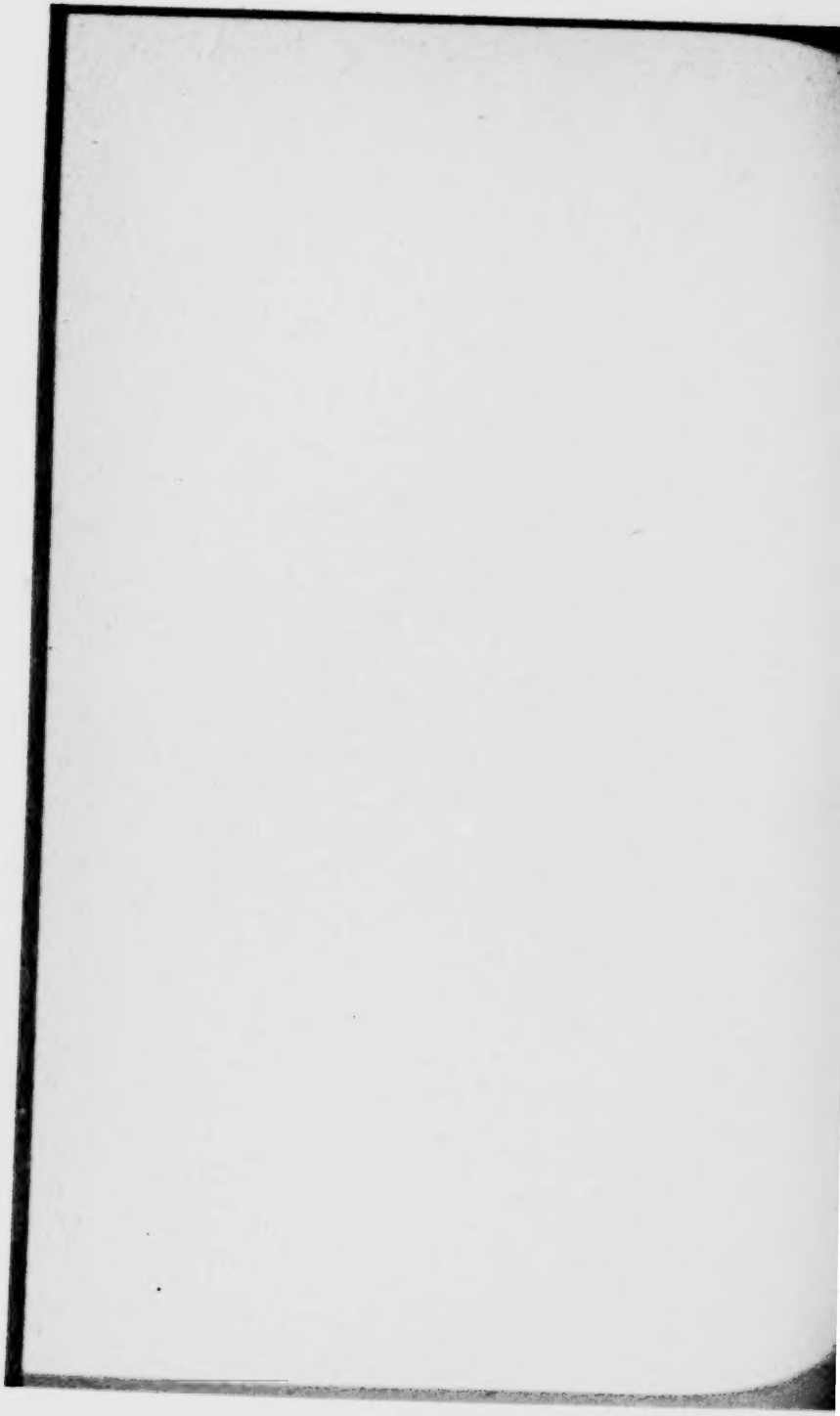
The justiciability of this question was, indeed, recogn
and assumed in the recent wartime prohibition ca
See also the sound reasoning in *Griesedieck Bros. B*
ery Co. v. *Moore*, 262 Fed. 582, 587-8.

Conclusion.

For the foregoing reasons, it is submitted that
act of Congress of August 10, 1917, as amended by
act of October 22, 1919 (40 Stat. 276, c. 53; 41 Stat.
c. 80), is unconstitutional and void in so far as it
tempts to provide that the making of "any unjust or
reasonable rate or charge in handling or dealing in
with any necessaries" shall constitute the commiss
of an infamous crime punishable by fine and impris
ment, and that the rulings of the lower courts in
above entitled cases were, therefore, right and sho
be affirmed by this court.

Washington, D. C., October 11, 1920.

William D. Guthrie,
Benjamin F. Spellman,
Bernard Hershkopf,
As *amici curiae*.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

NO. 324.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

L. COHEN GROCERY COMPANY.

In Error to the District Court of the United States,
Eastern District of Missouri.

JOHN A. MARSHALL,
D. N. STRAUP,
JOEL F. NIBLEY,
THOMAS MARIONEAUX,
As *Amici Curiae.*

INDEX

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FOREWORD.

The counsel submitting this brief to this Honorable Court are engaged as counsel for the Utah-Idaho Sugar Company, a corporation, and a number of its directors, against whom indictments have been brought in the United States District Court in and for the District of Utah, charging them with violations of Section 4 of the Food Control and the District of Columbia Rents Act, as amended October 22, 1919.

Counsel for the parties in this cause having kindly consented thereto, we beg, with leave of the Court, to file a

brief herein as *amicus curiae*. This brief is therefore most respectfully presented to the Court in the hope that it may be of service in the construction and in the determination of the constitutionality of the law in question.

The indictment in this case in its first count, filed in the District Court of the United States, within and for the Eastern Judicial District of Missouri, at the September (1919) term thereof, charges in substance that the defendant in error, a corporation doing business in the City of St. Louis, Missouri, was, on or about the 3d day of December, 1919, a dealer in sugar and other necessaries, and at, etc., in, etc., did wilfully and feloniously make an unjust and unreasonable rate and charge in handling and dealing in a certain necessary, to-wit, sugar, in that the said L. Cohen Grocery Company, not then and there being a farmer, gardener, horticulturist, vineyardist, planter, ranchman, dairyman, stockman, or other agriculturist engaged in dealing in farm products produced or raised upon any land owned, leased or cultivated by it, did demand of and exact and collect from and of one B. Heligman * * * the sum of $10.07 as and for the purchase price of about fifty pounds of granulated sugar, then and there purchased by the said B. Heligman from the said * * * Grocery Company, which said purchase price so demanded, exacted and collected for the said granulated sugar was and constituted an unjust and unreasonable rate and charge as it then and there well knew.

In the second count it is alleged that on or about the 4th day of December, 1919, at, etc., the said defendant,

not then and there being a farmer, gardener, etc., but being a dealer in the necessary as aforesaid, did wilfully and feloniously demand of and exact and collect from and of one B. Heligman the sum of $19.50 as the purchase price of one bag of granulated sugar, containing approximately one hundred pounds, then and there purchased by said Heligman from said defendant, and that said purchase price was and constituted an unjust and unreasonable rate and charge, as the said defendant then and there well knew.

The defendant interposed a demurrer to both counts of the indictment. The grounds of the demurrer in substance are that the indictment is not sufficiently explicit to advise the defendant "of what it will be required to meet at the trial," and that the allegations of fact are insufficient to protect the defendant from a subsequent indictment for the same offense.

It is also averred in the demurrer that on October 22, 1919, when the penal clause, on which the counts are based, was enacted, the necessity for such enactment had passed, because of the actual cessation of military and naval operations by the United States, and that therefore the indictment was and is an invasion of the rights of the States; and that the section of the amended statute upon which the counts are based violates the sixth amendment to the Constitution, "in that it affords a person no standard or criterion by which he can or could determine whether any act contemplated by him would be violative of the statute; it does not afford a standard, or criterion in conformity to which an indictment based upon the sec-

tion will, or can advise one, accused under the section, of the nature and cause of the accusation against him; it contains and provides no definition of terms employed so that it can be determined whether an act alleged to have been done is such an act as the section prohibits; it leaves to the determination of courts and juries what the Congress alone can determine within any lawful limitations, conditions, or circumstances."

The demurrer was sustained by the Court in the following memorandum of decision:

> The defendant, a corporation under the laws of the State of Missouri, stands indicted in this court in two counts under the amendment of October 22, 1919, of the act of August 10, 1917. To this indictment, and to both of the counts thereof, defendant demurs for that both the indictment, which follows the language of the amendment, supra, and the amendment itself, are insufficient to inform it of the nature and cause of the accusation against it; and, therefore, that both such indictment and the amendment itself, are violative of the sixth amendment of the Constitution of the United States.
>
> The language of the statute, which attempts to create the crime charged against the defendant, so far as that language is pertinent to the specific charge against this defendant, reads thus:
>
> "That it is hereby unlawful for any person wilfully to make any unjust or unreasonable rate or charge in handling or dealing in necessaries. * * * Any person violating any of the provisions of this section upon conviction thereof shall be fined not exceeding five thousand dollars and be imprisoned for not more than two years or both." (Sec. 2, Chap. 80, Stat. 1919, amendment of October, 1919, to the Lever Act.)

Following the language of the above statute the indictment charges that defendant "did wilfully and feloniously make an unjust and unreasonable rate and charge in handling and dealing in a certain necessary, to-wit, sugar;" and thereupon the indictment proceeds to aver the facts of the alleged sale of sugar, in that it sets forth the date of the purchase, the name of the purchaser, to whom said sugar was sold by defendant, the amount of sugar sold, and the price charged such purchaser therefor, and concludes by averring "that said purchase price so demanded, exacted and collected for the said granulated sugar, by the said L. Cohen Grocer Company from the said B. Heligman, was and constituted an unjust and unreasonable rate and charge, as it, the said L. Cohen Grocer Company then and there well knew."

Shortly before this, in a trial in this court upon a similar indictment against this defendant, at the close of the case, and upon a demurrer *ore tenus* bottomed upon the alleged insufficiency of the evidence to convict, I took occasion in an oral charge to say to the jury this:

"The act under which this prosecution is being had was approved on the 22d day of October, 1919, more than eleven months after the signing of the armistice. It is, of course, fundamental, gentlemen, that the constitutional validity of this act depends wholly upon whether, at the time it was passed and approved, a state of war existed between the United States of America and the Imperial German Government. Clearly, in a time of peace, a statute like this could not stand under the Constitution of the United States for a single minute.

"The Federal Constitution is not a limitation upon the powers of Congress, but it is a grant of powers to Congress, and beyond the limits of that grant neither Congress nor any other co-ordinate branch of the Government had a right to go. Con-

gress has no power to do anything unless power to act, either expressly or impliedly, is conferred by the terms of the organic law itself.

"So, in times of peace, the power to pass a statute like this is to be determined by the question whether the statute falls within the domain of interstate commerce, or within the domain of internal revenue. It must be within the domain of one or the other, or Congress has no power to invade the State's rights and pass it. Very clearly, this statute is not a manifestation of the power of legislation on matters of internal revenue. Just as clearly, in my opinion, or almost as clearly, at least, it is not a matter within the domain of interstate commerce. This is so because this act deals with the commodities that are affected by it after interstate commerce has wholly ceased to deal with these commodities; after, in other words, interstate commerce has acted and the commodity has come to rest in the State—in this case, in the State of Missouri.

"But since the Supreme Court of the United States in the liquor case has seemingly ruled that a legal state of war, or a legal fiction of war, exists and will continue to exist until the ratification of the treaty of peace with the German Republic, and until the proclamation of that fact by the President, although the Imperial German Government with which the war was declared, has ceased to be, I am, therefore, bound by this ruling. Consequently, whatever mental reservations I may hold personally, I take it that so far as that particular phase of the Constitution is concerned, that the act in question is valid.

"But, a most serious question is met after the constitutionality of the statute is settled, upon the point of its invasion of State's rights, the point that I have just been talking about. That question is, whether the act is not too vague, indefinite, and uncertain to be enforced by the courts, and whether

by reason of such vagueness, indefiniteness, and uncertainty it does not, in effect delegate the legislative power which is vested in Congress alone to the courts and to the juries of this country; and, also, whether this act by its existing terms fixes any definite or certain rule by which human conduct can be uniformly governed. In other words, the question arises—a serious question arises. Does it inform the accused of the nature and cause of the accusation against him, as the sixth amendment to the Constitution of the United States specifically and certainly requires? I can not be brought to think, so gentlemen.

"Briefly: This statute makes it a felony for any person—which, I take it, includes a corporation as well—wilfully to make any unjust or unreasonable charge in dealing in any necessary. It nowhere defines what is unjust or what shall be deemed unreasonable. It leaves it to the jury to find what particular thing it is that the law has made a felony of. One jury might very well say that a profit or charge of one cent a pound on sugar, above cost and carriage, is unjust and unreasonable, and so a felonious act; while another jury might say that a charge of twenty-five cents was not unjust and unreasonable. No criminal statute, gentlemen, ought to be so vague and uncertain as that the citizen can not at any given moment know whether he is a felon or a patriot.

"In the presence of the existing rapacity and greed of the profiteer, I confess it has been difficult for me to approach this question in a judicial frame of mind. It is to me a matter of most sincere regret that I find it my duty to say, so far as the application of this law to the fact presented in this identical case is concerned, that it is invalid, for the reason I have stated. It is regrettable that a law which was intended to be as beneficent as this law is intended to be, and which was intended and designed to remedy a most outrageous

and crying evil, should be found to fall short by reason of constitutional difficulties of the end sought to be attained. There never was a time when a curb of human greed and rapacity was so urgently demanded as it is demanded now, and I repeat, that the abhorrence I feel of the selfish hoggishness of the profiteer is such that I can scarcely deal with the question with the amount of judicial aplomb with which I ought to deal with it.

"But, in my opinion, gentlemen, these considerations do not warrant ruthless over-riding of the rights of the citizen to have stated in a criminal statute the certain and definite rights which hedge him about as a citizen, and the certain and definite definition by which he, or his counsel, can ascertain whether or not he is guilty of a felony.

"Congress alone has power to define crimes against the United States. This power cannot be delegated to the courts or to the juries of this country. * * *

"Therefore, because the law is vague, indefinite, and uncertain, and because it fixes no immutable standard of guilt, but leaves such standard to the variant views of the different courts and juries which may be called on to enforce it, and because it does not inform defendant of the nature and cause of the accusation against him, I think it is constitutionally invalid, and that the demurrer offered by the defendant ought to be sustained."

To these views thus orally expressed I am constrained to adhere, notwithstanding the fact that my attentaion has been called to certain cases which, it is urged, give color to the contention that statutes equally as vague, uncertain, and indefinite as that here involved have nevertheless been upheld by the Supreme Court of the United States as constitutionally valid. These cases are Standard Oil Company v. United States, 221 U. S. 106; Nash

v. U. S., 229 U. S. 273; and Waters-Pierce Oil Company v. Texas, 212 U. S. 86.

The case of Standard Oil Co. v. United States, supra, was a civil proceeding by injunction and for dissolution into its constituent elements for monopolization and restraint of trade, and it was not a criminal proceeding, such as is this at bar. The statute upheld in the Standard Oil case upon an attack analogous to this (or so far analogous as a civil case may be to a criminal one) were Sections 1 and 2 of the so-called Sherman Anti-Trust Act. Sections 1 and 2, act of July 2, 1890, Chap. 647, 26, Stat., 209) these sections denounced and declared unlawful all monopolies and combinations and conspiracies in restraint of trade. Aiding the view taken in the above case by the Supreme Court of the United States, reliance to a large extent was had upon the ancient common law definitions and crimes of engrossing and monopolizing. Since the above case was not a criminal one but a civil action, no occasion arose therein for any reference to or consideration by either court or counsel of the provisions of the sixth amendment to the Federal Constitution, and none such was made.

Neither was the case of Waters-Pierce Oil Company v. Texas, supra, a criminal case but a civil case in the nature of quo warranto. The trial thereof in the Texas State courts was had under certain statutes of that State, which provided as punishment for the violation thereof ouster and the assessment of certain penalties. Not the sixth amendment but that phrase of the fourteenth amendment touching due process of law was alone involved. (Waters-Pierce Oil Co. v. Texas, supra, 1 c. 111.) While the attack involved the alleged vagueness and indefiniteness of the Texas statutes these statutes clearly defined a monopoly. (Water-Pierce Oil Co. v. Texas, supra, 1 c. 99.) For the rest, what is said touching the Standard Oil case, supra, applies also to the Waters-Pierce case.

The case of Nash v. United States, supra, was, however, a criminal case under Sections 1 and 2, supra, of the Sherman Anti-Trust Act. The indictment in the Nash case was in two counts, one of which charged a conspiracy in restraint of trade, and the other a conspiracy to monopolize. It may or may not be a suggestive feature that there was originally also a third count which charged Nash with monopolization. This count was held to be bad on demurrer below and therefore fell out of the case.

In the course of the opinion in the Nash case it was pointed out that no overt act, nothing, indeed, beyond the bare conspiracy itself, need be either charged or proven; that the Sherman Anti-Trust Act punishes the conspiracies at which it is leveled on the common-law footing, and therefore does not make the doing of any act other than the act of conspiracy itself a condition of liability. Thus the Supreme Court justified the statutory crimes and conspiracies to monopolize, and conspiracies in restraint of trade, which are denounced by the Sherman Act by a relegation for their constituent elements back to the common-law definitions of the crimes of engrossing, monopolies and contracts in restraint of trade. (3 Coke Inst. 181, Chap. 85; 1 Hawkins P. C., Chap. 29, 5 and 6 Edw. VI, Chap. 14; Standard Oil Co. v. United States, 221 U. S. 1 c. 51.) Just here the query may logically arise as to where at common law is there any crime defined or denounced as "making an unjust or unreasonable charge in dealing in any necessary?"

After the Nash case was ruled, the Supreme Court of the United States again had occasion to refer to it and distinguish it in a case arising under the constitution and laws of the State of Kentucky. (International Harvester Co. vs. Kentucky, 234 U. S. 216.) Plaintiff in error in the above case was convicted and fined in the courts

of the State of Kentucky under certain statutes passed pursuant to provisions of the Kentucky constitution, which permitted the legislature to enact such laws as might be necessary to prevent all trusts "from combining to depreciate below its real value any article, or to enhance the cost of any article above its real value." The statutes passed by the legislature of Kentucky made it lawful to enter into any combination for the purpose of controlling prices, "unless for the purpose or with the effect of fixing a price that was greater or less than the real value of the article." The Supreme Court of the United States held that neither the constitution of Kentucky nor the statutes above referred to, and passed pursuant to the constitution, offered any standard of conduct that it is possible to know in advance and comply with, and that such provisions, as a consequence, were invalid. (International Harvester Co. vs. Kentucky, 234 U. S. 223.)

Distinguishing the Nash case from what was said in the International Harvester case, the Supreme Court said:

"We regard this decision as consistent with Nash v. United States (229 U. S. 373, 377), in which it was held that a criminal law is not unconstitutional merely because it throws upon men the risk of rightly estimating a matter of degree—what is an undue restraint of trade. That deals with the actual, not the imaginary, condition other than the facts. It goes no further than to recognize that, as with negligence, between the two extremes of the obviously illegal and the plainly lawful there is a gradual approach, and that the complexity of life makes it impossible to draw a line in advance without an artificial simplification that would be unjust. The conditions are as permanent as anything human, and a great body of precedents on the civil side coupled with familiar prac-

tice make it comparatively easy for common sense to keep to what is safe. But if business is to go on, men must unite to do it and must sell their wares. To compel them to guess on peril of indictment what the community would have given for them if the continually changing conditions were other than they are, to an uncertain extent; to divine prophetically what the reaction of only partially determinate facts would be upon the imaginations and desires of purchasers, is to exact gifts that mankind does not possess." (234 U. S. 223.)

While no reference was made by the Supreme Court in the above excerpt to the fact that common law crimes (which form the very foundation stones of the offenses denounced in the Sherman Anti-trust Act) were being dealt with in the Nash case, it is yet clearly obvious that the distinguishing features, as between the two classes of cases, brings this case into that class represented by the Kentucky Statutes, rather than the common-law class represented by the Nash case. Indeed, upon principle, I am unable to distinguish the instant case from the Kentucky case. No man would engage in business, and no self-respecting man would remain in business, if his fortune, good name, or liberty is to be determined solely by the heated and prejudiced views of what is unjust and unreasonable which may be entertained by a jury personally embarrassed and harrassed, it may be, by the inordinate rise in prices of all commodities. Such a law may be fit for the trial of the guilty; but laws ought to be fit both to try the guilty and the innocent. A law which is fit only to try those who are guilty necessarily begs the question of guilt, and is, therefore, no better than lynch law.

The definitions, boundaries, and limits of a criminal statute ought, at least, to be so clear that

no man in his right mind can be in doubt when he is violating and when he is not violating such statute. There ought not to be necessary any chopping of logic or intricate reasoning from cause to effect in order to decide the question of criminality.

If this law is to stand, then no longer would there seem need of defining crimes by separate statutes. All that will be necessary will be to pass a single sweeping statute, declaring that any person who shall commit any unjust or unreasonable act, or any wrongful or criminal act, shall be deemed guilty of a felony; and leave it to the jury to determine what is unjust, or unreasonable, wrongful, or criminal.

Neither is justification for the indefiniteness and uncertainty which inhere in the statute under discussion to be found in any alleged necessity to mitigate a present and crying evil which all right-thinking men must deprecate and abhor; for it would seem that it might simply have been declared that a sale of any necessary for a stated percentage increase in price, beyond cost and carriage, should be a punishable crime. At least, such a law would not be objectionable on the ground here urged. That it would have been arbitrary may be conceded. But the statute here is just as arbitrary, and to its arbitrariness is added an indefiniteness, vagueness, and uncertainty, which is dangerous, beyond excusing, to the property and liberty of innocent men.

For these reasons, and for others which I might add if leisure allowed, I think the demurrer to the indictment ought to be sustained.

C. B. Faris,

District Judge.

We take it that the demurrer, upon the ground that the indictment does not state facts sufficient to constitute an offense, raises the question of the constitutionality of the law and of the construction thereof.

The ultimate question, of course, is whether the indictment states facts sufficient to constitute a public offense. It may fail in such statement because the section under consideration is unconstitutional, or because when properly interpreted it is necessary in a prosecution under it, to state certain facts regarding which the indictment is silent.

Our contention is that the language of Section 4, upon which both counts of this indictment are based, does not relate to the *sale* of necessaries. The indictment proceeds upon the hypothesis that the following language, namely: "It is hereby made unlawful for any person to • • • engage in any discriminatory or unfair, or any deceptive, wasteful practice or device, or to make any unjust or unreasonable rate or charge, in handling or dealing in or with any necessaries," requires a dealer to sell at a just and reasonable price; but this is not the language of the act. Price is not mentioned. What is forbidden is an unjust or unreasonable rate or charge in handling or dealing in or with necessaries. It must be conceded that if what is here referred to is the price demanded upon a sale of necessaries, Congress has taken a most peculiar method of expressing its intention. But by this language we think that Congress did not have in mind the sale of necessaries. There are rates and charges made in handling or dealing in or with necessaries that

do not relate to the price paid upon a sale thereof, as for example, storage charges, commissions, interest upon advances made by factors to their principals, insurance, cartage, boxing, wrapping or sacking, and various other rates and charges for services may be mentioned.

One who has it in mind to prevent or to forbid a seller's disposing of his wares at an excessive or unreasonable *price* does not usually omit all mention of the words "sale" or "price." A sale is defined to be a transfer of property for a consideration in money. The consideration is invariably referred to as the price.

It is evident that in the passage of the "Act to enable the President to carry out the price guaranties made to purchasers of wheat of the crops of 1918 and 1919, and to protect the United States against undue enhancement of its liabilities thereunder,"—Act of March 4, 1919, Chapter 125, 40 Stat. L. 1348,—Congress did not regard the words "discriminatory or deceptive practice or device, or any unjust or unreasonable rate or charge"—which is the language in substance of Section 4—as definitive of the transaction commonly called a sale, for after making it "unlawful for any licensee to engage in any unfairly discriminatory or deceptive practice or device, or to make any unjust or unreasonable rate, commission or charge,"—the words *"or to exact an unreasonable profit or price"* are added in Section 5 in regulating the conduct of persons handling or dealing in or with wheat, wheat flour, bran and shorts.

We quote from Section 5 of the Act:

"It shall be unlawful for any licensee to engage

in any unfairly discriminatory or deceptive practice or device, or to make any unjust or unreasonable rate, commission, or charge, or to exact an unreasonable profit or price, in handling or dealing in or with wheat, wheat flour, bran, and shorts. Whenever the President shall find that any practice, device, rate, commission, charge, profit, or price of any licensee is unfairly discriminatory, deceptive, unjust or unreasonable, and shall order such licensee, within a reasonable time fixed in the order, to discontinue the same, unless such order, which shall recite the facts found, is revoked or suspended, such licensee shall, within the time prescribed in the order, discontinue such unfairly discriminatory, deceptive, unjust, or unreasonable practice, device, rate, commission, charge, profit, or price. The President may, in lieu of any such unfairly discriminatory, deceptive, unjust, or unreasonable practice, device, rate, commission, charge, profit, or price, find what is a fair, just, or reasonable practice, device, rate, commission, charge, profit, or price, and in any proceeding brought in any court such order of the President shall be prima facie evidence. Any person who, without a license issued pursuant to this section, or whose license shall have been suspended, or revoked after opportunity to be heard has been afforded him, intentionally and knowingly engages in or carries on any business for which a license is required under this section, or intentionally and wilfully fails or refuses to discontinue any unfairly discriminatory, deceptive, unjust, or unreasonable practice, device, rate, commission, charge, profit, or price, in accordance with the requirement of an order issued under this section, or intentionally and wilfully violates any regulation prescribed under this Act, shall be deemed guilty of a misdemeanor, and upon conviction thereof be punished by a fine not exceeding $1,000." (40 Stat. L. 1348.)

It is certain that in the enactment of Section 5 of the Act of 1919, Congress did not consider the words "rate or charge" sufficient to describe the price taken upon a sale of wheat, wheat flour, bran, or shorts; and there is no reason for supposing that it considered these words as defining a sale when it enacted Section 4 of the Act of 1917.

In the construction of a particular statute or in the interpretation of any of its provisions all acts relating to the same subject or having the same general purposes in view should be read in connection with it.

Woods v. Carl, 75 Ark. 328, 87 S. W. 621. (Affirmed in 203 U. S. 358, 51 L. Ed. 219);

See also 36 Cyc. 1147-8.

The meaning of doubtful words in one statute may be determined by reference to another in which the same words have been used in a more obvious sense.

36 Cyc., supra;

Eckerson v. Des Moines, 115 N. W. 177, 137 Ia. 452.

The construction of a statute by the legislature as indicated by the language of subsequent enactments is entitled to great weight.

36 Cyc. 1142.

Referring again to Section 4 of the Lever Act, we think it is evident for another reason that the words "rate or charge" there used do not have reference to the "price" or "profit" exacted upon the sale of necessaries. There is a statute of the United States (Section 37, 35

Stat. 1096) which makes it unlawful for any person to conspire or agree with another to violate any law of the United States. Section 4 of the Lever Act, after making it unlawful to make any unreasonable *rate* or *charge* in handling or dealing in necessaries, provides that it shall be unlawful for any person to conspire, combine, agree or arrange with any other person to • • • "exact excessive prices for any necessaries." Now it was wholly unnecessary to add this provision to Section 4, if to make an unjust or unreasonable rate or charge forbade one to exact excessive prices for necessaries. The law-maker is always presumed to know the existent law.

36 Cyc. 1136, 1145;
Ensley v. State, 88 N. E. 62.

If the inhibition against making any unjust or unreasonable *rate* or *charge* was an inhibition against the exaction of excessive *prices* for necessaries, then by virtue of the law as it already existed any person would be guilty of conspiracy under Section 37 who conspired, combined or agreed with any other person "to exact excessive *prices* for any necessaries;" but Congress, not regarding the inhibition against making any unjust or unreasonable rate or charge as forbidding one to "exact an unreasonable price in handling or dealing in or with any necessaries," appreciated that a conspiracy, combination, agreement or arrangement between several to exact excessive prices for necessaries would not be punishable under Section 37, and for that reason made pro-

vision for such a conspiracy in Section 4 of the Lever Act.

When we come to examine the conspiracy clauses of Section 4 we observe that conspiracies, combinations, etc., there prohibited, do not in express terms *relate to any of the acts declared unlawful in the preceding portion of the section.* It was very proper not to include in the conspiracy portion of this section any of the acts forbidden by the language preceding the word "necessaries" in line 11 because Section 37, 35 Stat. 1096, of necessity make it criminal for any person to conspire, combine, agree or arrange with any other person to commit any of the acts thus forbidden. Therefore, we find Congress very properly making special provision for conspiracies, combinations and agreements to do things not expressly forbidden anywhere in the first eleven lines of Section 4.

Let us divide Section 4 into two parts, the part which precedes the words "*conspire, combine, agree or arrange with any other person,*" and the part which includes and follows these words. Now, the first part declares certain acts unlawful. Then the second part makes it unlawful to conspire, combine, agree or arrange with any other person to accomplish certain *other acts*—acts not already prohibited.

In this second portion of the section *none of the acts already prohibited above is included.* None of them is included because conspiring, combining, agreeing or arranging with any other person to commit any of those acts was already prohibited by Section 37, 35 Stat. 1096, the general conspiracy statute, for it is a conspiracy un-

der that statute to agree with any other person to violate any law of the United States. The very circumstance that in what we have called the second part of Section 4 it is made unlawful *to conspire with any other person to exact excessive prices for any necessaries*, is proof of the fact that *exacting excessive prices for any necessaries is not an act prohibited* in what we have called the first part of Section 4, the part containing the words "rate or charge."

Let us combine the two provisions of the law in order to make our meaning clearer. Revised Statute, Section 5440, amended, May 17, 1879, c. 8, 21 Stat. 4, March 4, 1909, c. 321, Section 37, 35 Stat. 1096, provides as follows:

> "If two or more persons conspire either *to commit any offense against the United States* or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

Now, on August 10, 1917, Congress enacted Section 4 of the Lever Act, as follows:

> "Section 4. • • •
>
> It is hereby made unlawful for any person wilfully to destroy any necessaries for the purpose of enhancing the price or restricting the supply thereof; knowingly to commit waste or wilfully to permit preventable deterioration of any necessaries in or in connection with their production, manufacture, or distribution; to hoard, as defined in Section 6 of this Act, any necessaries; to monopolize or attempt to monopolize, either locally or generally, any necessaries; *to engage in any dis-*

criminatory and unfair, or any deceptive or wasteful practice or device, or to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries. • • •"

Now, we submit, that to conspire, combine, agree or arrange with any other person to do any of the acts above enumerated, would be punishable under Section 37; hence if "any unjust or unreasonable rate or charge," the language of Section 4, is comprehensive enough to include the exaction of any excessive or unjust or unreasonable price upon the sale of necessaries, then Section 37 makes it criminal to conspire, combine, agree or arrange with any other person to exact excessive prices for the same.

Nothing more needed to be enacted to make such an act criminal. If, therefore, we find that the law maker does add additional language to Section 4, specifically making it criminal to conspire, combine or agree with any other person to exact excessive prices for necessaries, then we insist that no other rational conclusion is admissible, except that in the opinion of the law maker he had not until he had added these additional words to Section 4, made such conduct criminal. It follows, therefore, that the words in Section 4, "it is hereby made unlawful for any person wilfully to engage in any discriminatory or unfair or any deceptive or wasteful practice or device, or to make any unjust or unreasonable rate or charge, in handling or dealing in or with any necessaries," have no reference to the price exacted or demanded upon the sale of necessaries.

If we are correct in this contention it follows that the

indictment alleges an act which the statute does not forbid, and that the demurrer was therefore properly sustained upon the ground that the indictment failed to state facts sufficient to constitute an offense.

We do not contend that the Lever Act does not in terms forbid the sale of necessaries at an excessive price. Section 5 of the original act reads as follows:

> "That from time to time, whenever the President shall find it essential to license the importation, manufacture, storage, mining, or distribution of any necessaries, in order to carry into effect any of the purposes of this Act, and shall publicly so announce, no person shall, after a date fixed in the announcement, engage in or carry on any such business specified in the announcement of importation, manufacture, storage, mining, or distribution of any necessaries as set forth in such announcement, unless he shall secure and hold a license issued pursuant to this section. The President is authorized to issue such licenses and to prescribe regulations for the issuance of licenses and requirements for systems of accounts and auditing of accounts to be kept by licensees, submission of reports by them, with or without oath or affirmation, and the entry and inspection by the President's duly authorized agents of the places of business of licensees. Whenever the President shall find that any storage charge, commission, profit, or practice of any licensee is unjust, or unreasonable, or discriminatory and unfair, or wasteful, and shall order such licensee, within a reasonable time fixed in the order, to discontinue the same, unless such order, which shall recite the facts found, is revoked or suspended, such licensee shall, within the time prescribed in the order, discontinue such unjust, unreasonable, discriminatory and unfair storage charge, commission,

profits, or practice. The President may, in lieu of any such unjust, unreasonable, discriminatory, and unfair storage charge, commission, profit, or practice, find what is a just, reasonable, non-discriminatory and fair storage charge, commission, profit, or practice, and in any proceeding brought in any court such order of the President shall be prima facie evidence. Any person who, without a license issued pursuant to this section, or whose license shall have been revoked, knowingly engages in or carries on any business for which a license is required under this section, or wilfully fails or refuses to discontinue any unjust, unreasonable, discriminatory and unfair storage charge, commission, profit, or practice, in accordance with the requirements of an order issued under this section, or any regulation prescribed under this section, shall, upon conviction thereof, be punished by a fine not exceeding $5,000, or by imprisonment for not more than two years, or both: *Provided*, That this section shall not apply to any farmer, gardener, co-operative association of farmers or gardeners, including livestock farmers, or other persons with respect to the products of any farm, garden, or other land owned, leased, or cultivated by him, nor to any retailer with respect to the retail business actually conducted by him, nor to any common carrier, nor shall anything in this section be construed to authorize the fixing or imposition of a duty or tax upon any article imported into or exported from the United States, or any State, Territory, or the District of Columbia: *Provided further*, That for the purposes of this Act, a retailer shall be deemed to be a person, co-partnership, firm, corporation, or association not engaging in the wholesale business whose gross sales do not exceed $100,000 per annum."

The first sentence in Section 5 forbids any person to engage in or carry on the business of importation, manufacture, storage, mining, or distribution of any necessaries, without a license from the President.

The second sentence provides for the issuance of licenses by the President, for regulations with respect thereto, for systems of account by licensees, for reports, and for the entry and inspection of the places of business of licensees by the President's authorized agents.

The third sentence provides that whenever the President shall find any *storage charge, commission, profit or practice* of any licensee is unjust or unreasonable, or discriminatory or unfair or wasteful, the licensee shall upon demand of the President discontinue such *storage charge, commission, profit or practice.*

The next sentence provides that the President may find and declare what is a just, reasonable, non-discriminatory and fair storage charge, commission and practice, and in any proceeding brought in any court such finding of the President shall be prima facie evidence.

It is next provided that any person who, without a license, carries on any business for which a license is required under the section, or wilfully fails or refuses to discontinue any discriminatory and unfair storage charge, commission, profit or practice which has been forbidden as unjust or unreasonable, shall be punished by a fine or imprisonment or both.

Our contention is that in order to ascertain the intention of Congress it is necessary to construe Sections 4 and 5 together. We respectfully submit that what the

President is authorized to inquire into, and condemn and regulate, under the provisions of Section 5, is not the price at which his licensees *sell* necessaries. Neither sale nor price is anywhere mentioned in this section, and we cannot help but regard the omission of all reference to sale or price as conclusively indicating that the price exacted upon a sale of necessaries was not in the mind of the writer of Section 5. Notwithstanding the great flexibility of the English language a sale is an act, and the price exacted upon the sale is a thing so familiar, and these words are so common, that it is seldom indeed that in speech or writing we find a sale described without the use of the word "sale" or "price."

If in the enactment of Section 5 of the Lever Act of August 10, 1917, the words used in the third paragraph include the exaction of an excessive price for necessaries, we ask again, why was it that Congress did not deem these words sufficient in the enactment of Section 5 of the Act of March 4, 1919? Dealing with the same subject there Congress declared:

> "Whenever the President shall find that any practice, device, *rate*, commission, *charge*, profit *or price* of any licensee is unfair or discriminatory, deceptive, unjust or unreasonable, and shall order such licensee * * * to discontinue the same, * * * such licensee shall * * * discontinue such unfairly discriminatory deceptive, unjust or unreasonable practice, device, *rate*, commission, *charge*, profit or *price*."
>
> Section 5, 40 Stat. L. 1350.

Section 5 of the Lever Act evidently contemplates the licensing of all persons handling or dealing in or with any necessaries, except retailers and certain other persons mentioned in the proviso. We insist that it would be a rather curious conclusion to suppose that Section 4 was intended to prohibit the exaction of excessive prices for necessaries upon a sale thereof by *any* person handling or dealing in or with the same, *including retail dealers;* and that Section 5 contemplates that all persons, except *retail dealers*, should be forbidden to engage in the importation, manufacture, storage, mining or *distribution* of necessaries without a license from the President. It seems to us a much more rational construction to say that Section 5 is co-extensive with Section 4, in that *all persons* who handle or deal in necessaries must submit to have their conduct regulated by the President or his authorized agents in the respects stated in Section 5, and that retail dealers are excluded by the provisions of Section 5, because their business consists almost altogether in *selling* commodities and the fixing of the prices at which necessary commodities may be sold is provided for by Section 25. We are forbidden to suppose retail dealers to be included in Section 4, not only because, as we think we have already shown, the language of Section 4 does not embrace sales, but because to include retail dealers in necessaries, in respect to sales made by them, in the provisions of Section 4, when they are clearly and specifically excepted from the provisions of Section 5, would produce this result: That no person engaged in the importation, manufacture, storage, mining or *distribution*

of any necessaries, acting with the license of the President, would be punishable for any unjust or unreasonable or unfair price exacted upon a sale of any necessary, unless his act was in violation of an order of the President issued pursuant to the provisions of Section 5; whereas any retail dealer would be punishable (assuming the constitutionality of the law), for any price taken by him which a jury might deem unjust, unreasonable or unfair; so that some would be punished only when they had acted in defiance of a Presidential order condemning their practices or prices, and some would be punished although entirely innocent of any such disobedience, and all might be selling the same article at the same price! This conclusion necessarily follows, unless it is to be held that the licensees of the President may be punished for making unreasonable rates or charges, although such rates or charges have not been investigated or condemned by the President or the Federal Trade Commission, or any other agency of the President. But such a holding we insist is forbidden by the maxim: *Expressio unius est exclusio alterius.* It is not a sensible construction of the law, we insist, to say that the dealer is punishable for making rates or charges which have not been condemned, when the law expressly declares that he is punishable for making rates and charges which have been investigated by hearing evidence, and which have been condemned after the hearing, and of which hearing, evidence and condemnation the dealer has been advised.

It is not necessary to contend that such a discrimination would be unconstitutional. We think it is suffi-

cient to contend that such a discrimination would be unreasonable, and because it would be unreasonable we must conclude that such discrimination was not intended by the law maker. We are confident that Congress never intended to protect all citizens from punishment on account of the prices exacted by them in handling or dealing in necessaries, as long as they complied with the orders of the Executive Department promulgated after an inquiry and determination of what would be reasonable, and subject other citizens to the hazard of determining upon their own responsibility what would be reasonable and just, and punishing them without any admonition from the State, except admonition from a jury by a verdict of guilty requiring fine or imprisonment.

Section 5 clearly indicates that in the opinion of Congress a storage charge, commission, profit or practice of a person engaged in importation, manufacture, storage, mining or distribution of necessaries might be made, taken or indulged in without any intention upon the part of the citizen to be unjust, unreasonable, discriminatory or unfair, and therefore it was wisely provided that he should not be punished for his conduct in respect to these matters until it had first been examined into by the President, and by him found to be unjust or unreasonable, and the citizen admonished to discontinue it. Now, is it to be supposed that Congress thought that retail dealers were so wise as to need no such protection and warning, and that they would be able to tell in all cases whether any storage charge, commission, profit or practice on their part was just or reasonable, and be so easily able

to avoid it as that it was just that they should be punished without warning whenever their conduct should meet with the condemnation of a jury? If this was supposed to be fair to the retail dealer engaged in the distribution of necessaries, why was not it supposed to be fair as to the licensees of the President engaged in the "importation, manufacture, storage, mining and distribution" of necessaries? According to the contention of the Government the retail dealer in necessaries is excluded from all the protection afforded by the provisions of Section 5, but is exposed to all the dangers supposed to be encountered by those who handle or deal in necessaries by reason of the language of Section 4.

Our contention is that the retail dealer, *in selling necessaries*, is not within the language of Section 4. It results from our construction that no one is punishable for selling at an unjust or unreasonable price, if we assume that Section 5 enables the President to fix prices, unless he has violated an Executive order made pursuant to the provisions of said section.

Rate or charge commonly refers to compensation for services rendered. We speak of the rates or charges of a telephone or telegraph or railroad company for the services they render. We speak of the "price," not the "rate" or "charge" at which goods are sold.

The case of Barnard v. Morton, 1 Curt. U. S. 404, illustrates the meaning of the word "charge." We quote the following from the language of the Court:

> "Among the items denominated *charges* in the invoices are the expenses of carting the bags. It

is not denied in the protest, nor is there any ground to deny, that this is properly denominated one of the *charges*, and is to be added to the market value of the salt. If so, it would be strange if the expense of the sacks themselves were to be excluded. Take the definition of the word *charges* given by one of the witnesses—the expenses of getting the article on shipboard; if the cartage of the sacks comes into the *charges*, it must be because the sacks are a component part of the article bag salt; and if so, the cost of the sacks is one of the costs of that article."

"*Charges* are expenses incurred in relation to a transaction or suit. The word 'charges' in an agreement has been held not to include commissions or other compensation."

Green v. Jones, 78 N. C. 268.

"Charges in mercantile usage include only real expenses."

Alexander v. Morris, 3 Call (Va.) 99.

We concede, of course, that charge may refer to price. It may refer to the price for goods supplied, as well as a compensation demanded for services rendered, but we insist that it cannot be said that in Section 4 the words "rate or charge" necessarily refer to the price for goods supplied. If these words necessarily had such meaning it is certain that Congress would not in Section 5 of the Act of March, 1919, have followed the words "rate or charge" by the words "excessive price or profit," as we have heretofore pointed out.

This Court has said:

"Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid. United States

v. Sharp, Pet. C. C. 118. Before a man can be punished, his case must be plainly and unmistakably within the statute. United States v. Lacher, 134 U. S. 624, 628."

United States v. Brewer, 139 U. S. 278-288;

See also Lamborn et al. v. McAvoy et al., 265 Fed.

There would, of course, be no room to contend that the words "rate or charge" do not have reference to the price taken for goods supplied, if, by such construction, the section would be rendered nugatory, but such construction does not render the section nugatory. In mercantile usage there are numerous rates and charges distinct from the price demanded upon a sale, upon which the language of Section 4 may properly operate.

The persons forbidden to impose unjust rates and charges are those who handle or deal in necessaries. Merchandise brokers, commission merchants, wholesalers, jobbers, common carriers—all impose "rates" and "charges" in handling and dealing in goods, which "load" or "burden" the price of the commodity finally to the retailer and ultimate consumer.

In East Tennessee etc. Railroad Co. v. Hunt, 15 Lea (Tenn.) 261, the Court construed the term "charges" as used in a bill of lading not to include demurrage, saying that it was plainly confined by the terms of the instrument to cooperage and repairs.

It has been held that Section 4 as originally enacted, was defective in lacking a sanction for the acts which it prohibits.

Mossew v. United States, United States Circuit Court of Appeals of New York, May 19, 1920.

At first proposing it must strike us all as singular that Congress should recite, as it does in Section 1 of the law under consideration, that "by reason of the existence of a state of war it is essential to the National security and defense, and for the successful prosecution of the war, and the support and maintenance of the Army and Navy, to assure an adequate supply and equitable distribution," etc., and then with that important object in view forbid certain things to be done, *but provide no penalty for the doing of them.*

It is true that Section 4 itself (as originally enacted) contains no express sanction for the acts prohibited, but **it is not conceivable that Congress intended that violators of the provisions of this section should go unpunished.**

It is certain that by Section 5 and Section 25 express provision is made for the punishment of those persons who are guilty of making any storage charge, commission or profit, or of any practice which has been found and declared to be unjust or unreasonable or discriminatory or unfair or wasteful (Section 5), or who "shall with knowledge that the prices of any • • • commodity have been fixed, • • • demand or receive a higher price." (Section 25, 40 Stat. 284.)

We insist, therefore, that the amendment to Section 4, made October 22, 1919, prescribing a penalty of fine or imprisonment for the violation of any of the provisions of Section 4, leaves the law in its original state in respect

to the acts necessary to be done to constitute a violation thereof.

By the terms of Section 1, coke and coal are obviously to be considered, within the meaning of the Act, as necessaries. If the contention of the Government is correct, then Section 4 requires the sale of coke and coal at just and reasonable prices, and not at prices determined by the President or any agency of the Government, but at prices determined by a jury after the sale is made. But if this be the true construction of the law, why did Congress in Section 25 thereof authorize the President whenever and wherever in his judgment necessary for the efficient prosecution of the war, to fix the price of coal and coke wherever and whenever sold, and declare that "said authority and power may be exercised by him in each case through the agency of the Federal Trade Commission?"

We submit, therefore, that the substance of the law is as follows:

> "Sec. 4. It is hereby made unlawful for any person * * * to engage in any discriminatory or unfair, or any deceptive or wasteful practice or device, or to make any unjust or any unreasonable rate or charge in handling or dealing in or with any necessaries. * * *"
>
> "Section 5. Whenever the President shall find that any storage charge, commission, profit or practice of any licensee is unjust or unreasonable or discriminatory and unfair, or wasteful, and shall order such licensee * * * to discontinue such unjust, unreasonable and unfair storage charge, commission, profits or practice, * * * any person who * * * wilfully fails or re-

fuses to discontinue any unjust, unreasonable, discriminatory and unfair storage charge, commission, profit or practice in accordance with the requirement of an order issued under this section * * * shall, upon conviction thereof, be punished by a fine not exceeding $5,000 or by imprisonment for not more than two years, or both. * * *"

"Section 25. The President * * * is hereby authorized and empowered whenever and wherever in his judgment necessary for the efficient prosecution of the war, to fix the price of coal and coke wherever and whenever sold. * * * Said authority and power may be exercised by him in each case through the agency of the Federal Trade Commission. * * *"

Section 25 further provides:

"Having completed its inquiry respecting *any commodity in any locality*, it shall, if the President has decided to fix the prices at which any such commodity shall be sold by producers and dealers generally, fix and publish maximum prices for both producers of and dealers in any such commodity, which maximum prices shall be observed by all producers and dealers until further action thereon is taken by the commission.

In fixing maximum prices for producers the commission shall allow the cost of production, including the expense of operation, maintenance, depreciation, and depletion, and shall add thereto a just and reasonable profit.

In fixing such prices for dealers, the commission shall allow the cost to the dealer and shall add thereto a just and reasonable sum for his profit in the transaction.

The maximum prices so fixed and published shall not be construed as invalidating any contract in which prices are fixed, made in good faith, prior

to the establishment and publication of maximum prices by the commission.

Whoever shall, with knowledge that the prices of any such commodity have been fixed as herein provided, ask, demand, or receive a higher price, or whoever shall, with knowledge that the regulations have been prescribed as herein provided, violate or refuse to conform to any of the same, shall, upon conviction, be punished by fine of not more than $5,000, or by imprisonment for not more than two years, or both. Each independent transaction shall constitute a separate offense."

So we observe that Congress has dealt specifically with price fixing, and even if we shall conclude that Section 4 regulates prices and provides for the punishment of unjust or unreasonable prices, the general rule is applicable that special provisions of the statute must control general provisions, and under this rule *punishment is to be imposed only for selling necessaries at prices expressly prohibited.*

The case of sales by retail dealers, who are expressly excepted from the provisions of Section 5, is expressly provided for by the provisions of Section 25, quoted above.

Where one part of a statute is susceptible of two constructions and the language of another part is clear and definite and is consistent with one of such constructions and opposed to the other, that construction must be adopted which will render the clauses harmonious.

36 Cyc. 1132.

In construing a statute the legislative intent is to be determined from a general view of the whole act, with

reference to the subject matter to which it applies and the particular topic under which the language is found.

36 Cyc. 1128, and Notes 55 and 56.

It is the duty of the Court, so far as practicable, to reconcile the different provisions so as to make them consistent and harmonious, and to give a sensible and intelligent effect to each.

36 Cyc. 1129, and notes.

Where general terms or expressions in one part of a statute are inconsistent with more specific and particular provisions in another part, the particular provisions will be given effect as clearer and more definite expressions of the legislative will.

36 Cyc. 1130-1131.

Where a statute includes both a particular and also a general enactment, which in its most comprehensive sense would include what is embraced in the particular one, the particular enactment must be given effect, and the general enactment must be taken to embrace only such cases within its general language as are not within the provisions of the particular enactment.

Sanford v. King, 19 S. D. 334, 103 N. W. 28;
36 Cyc. 1131.

Sales by retail dealers are covered by the particular provisions of Section 25—are excluded from the provisions of Section 5, and are not embraced in Section 4.

In expounding one part of a statute resort should be had to every other part, including even parts that are unconstitutional, or that have been repealed.

New York Saving Bank v. Field, 3 Wall. (U. S.) 495, cited in 36 Cyc. 1132.

If it should be held that Section 4 prohibits the sale of necessaries at an unjust or unreasonable price, it also prohibits various other things, and if Section 5 or Section 25 contains provisions for fixing the price of necessaries, and punishing those who exceed such prices after notice thereof, then we have a case of one section dealing with the subject in a general way and another section dealing with it in a definite and particular manner.

It is said by the learned author on Statutes in Cyc.:

> "Where there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized if possible with a view to give effect to a consistent legislative policy, and as to the extent of any necessary repugnancy between them, the special will prevail over the general statute."
>
> 36 Cyc. 1151.

So, for plainer reasons it must be true that if there is one section of a statute dealing with a subject in general and comprehensive terms (as Section 4), and other sections dealing with a part of the same subject (Sections 5 and 25) in a more minute and definite way, the three should be read together and harmonized if possible, with a view to give effect to a consistent legislative policy, that policy in this instance, it seems very clear, is only to regulate prices, after inquiry and determination by the executive branch of the Government, and after admoni-

tion to the citizens in respect to the rates, charges and prices which they may exact in dealing in necessaries.

We think it unnecessary to enter upon any discussion of the spirit in which the statute should be construed. It is a criminal statute. So far as its purpose is to prevent the sale of necessaries at exorbitant prices after inquiry and determination of what is just and fair, and notice given to dealers forbidding them to exact unfair prices, its purpose is beneficent, and compliance with its provisions is not difficult; but however beneficent the purpose of the statute, its scope will not be expanded to include acts which are not clearly described and provided for, and if there is doubt as to whether the act charged, —namely, a sale of necessaries not alleged to be in violation of any price theretofore fixed—is embraced in the prohibition of the statute, *that doubt is to be resolved in favor of the defendant.*

See Leonard v. Bosworth, 4 Conn. 421, holding that to subject a party to a penalty for violation of a statute it is not sufficient that the offense is within the mischief, if it be not within the literal construction of the statute.

36 Cyc. 1186-7, note 52.

It must be admitted to be a principle of universal justice that all persons are entitled to the equal protection of the law. We do not purpose in this brief to discuss the constitutionality of a statute which should deny this principle, but we think it is a safe canon of construction to construe all laws, if possible, so that this principle may not be violated. This principle is infringed if some citizens dealing in necessaries are protected by notice of the

price at which they may lawfully sell, and citizens dealing in the same necessaries are liable to punishment without such notice. We avoid this situation if we conclude that Section 4 does not refer to price taken for goods supplied; but that "price" is covered by Section 25, and *possibly* by Section 5. If we are correct, provision for fixing prices is specifically made by the statute, and punishment for exceeding the prices fixed is expressly provided.

THE CONSTITUTIONALITY OF THE LAW.

The question of the constitutionality of the law because of the indefiniteness of the words "unreasonable rate or charge," does not, of course, arise in this case if our construction of the law is correct. We heartily agree with the opinion of the learned District Judge, that the language of the section is entirely too indefinite for a valid criminal statute, if Congress has attempted to require a dealer in necessaries to judge at his peril of the price he may take when he is lawfully authorized to make the sale. In our view, however, Congress has not placed the dealer in this perplexing and dangerous situation, but has only forbidden him to exact a price upon the sale of necessaries which has been expressly declared to be unjust or unreasonable.

Respectfully submitted,

JOHN A. MARSHALL,
D. N. STRAUP,
JOEL F. NIBLEY,
THOMAS MARIONEAUX,
As *Amici Curiae*.

SUPREME COURT OF THE UNITED STATES.

No. 324.—October Term, 1920.

The United States of America, Plaintiff in Error, vs. L. Cohen Grocery Company.	In Error to the District Court of the United States for the Eastern District of Missouri.

[February 28, 1921.]

Mr. Chief Justice White delivered the opinion of the Court.

Required on this direct appeal to decide whether Congress under the Constitution had authority to adopt section 4 of the Lever Act as reenacted in 1919, we reproduce the section so far as relevant (Act of Oct. 2, 1919, c. 80, sec. 2, 41 Stat. 297):

"That it is hereby made unlawful for any person wilfully . . . to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries; to conspire, combine, agree, or arrange with any other person . . . (e) to exact excessive prices for any necessaries . . . Any person violating any of the provisions of this section upon conviction thereof shall be fined not exceeding $5,000 or be imprisoned for not more than two years, or both; . . ."

The text thus reproduced is followed by two provisos exempting from the operation either of the section or of the Act enumerated persons or classes of persons engaged in agricultural or similar pursuits.

Comparing the reenacted section with the original text (Act of August 10, 1917, c. 53, sec. 4; 40 Stat. 276), it will be seen that the only changes made by the reenactment were the insertion of the penalty clause and an enlargement of the enumerated exemptions.

In each of two counts the defendant, the Cohen Grocery Company, alleged to be a dealer in sugar and other necessaries in the city of St. Louis, was charged with violating this section by wilfully and feloniously making an unjust and unreasonable rate and charge in handling and dealing in a certain necessary, the specifica-

tion in the first count being a sale for $10.07 of about 50 lbs. of sugar, and that in the second, of a 100-pound bag of sugar for $19.50.

The defendant demurred on the following grounds: (a) That both counts were so vague as not to inform it of the nature and cause of the accusation; (b) that the statute upon which the indictment was based was subject to the same infirmity because it was so indefinite as not to enable it to be known what was forbidden, and therefore amounted to a delegation by Congress of legislative power to courts and juries to determine what acts should be held to be criminal and punishable; and (c) that as the country was virtually at peace Congress had no power to regulate the subject with which the section dealt. In passing on the demurrer the court, declaring that this court had settled that until the official declaration of peace there was a status of war, nevertheless decided that such conclusion was wholly negligible as to the other issues raised by the demurrer, since it was equally well settled by this court that the mere status of war did not of its own force suspend or limit the effect of the Constitution, but only caused limitations which the Constitution made applicable as the necessary and appropriate result of the status of war, to become operative. Holding that this latter result was not the case as to the particular provisions of the 5th and 6th Amendments which it had under consideration, that is, as to the prohibitions which those amendments imposed upon Congress against delegating legislative power to courts and juries, against penalizing indefinite acts, and against depriving the citizen of the right to be informed of the nature and cause of the accusation against him, the court, giving effect to the amendments in question, came to consider the grounds of demurrer relating to those subjects. In doing so and referring to an opinion previously expressed by it in charging a jury, the court said:

"Congress alone has power to define crimes against the United States. This power cannot be delegated to the courts or to the juries of this country. . . .

"Therefore, because the law is vague, indefinite, and uncertain, and because it fixes no immutable standard of guilt, but leaves such standard to the variant views of the different courts and juries which may be called on to enforce it, and because it does not inform defendant of the nature and cause of the accusation against him, I think it is constitutionally invalid, and that the demurrer offered by the defendant ought to be sustained."

The indictment was therefore quashed.

In cases submitted at about the same time with the one before us and involving identical questions with those here in issue it is contended that the section does not embrace the matters charged. We come, therefore, on our own motion in this case to dispose of that subject, since if well founded the contention would render a consideration of the constitutional questions unnecessary. The basis upon which the contention rests is that the words of the section do not embrace the price at which a commodity is sold, and, at any rate, the receipt of such price is not thereby intended to be penalized. We are of opinion, however, that these propositions are without merit, first, because the words of the section, as reenacted, are broad enough to embrace the price for which a commodity is sold, and second, because as the amended section plainly imposes a penalty for the acts which it includes when committed after its passage, the fact that the section before its reenactment contained no penalty is of no moment. This must be the case unless it can be said that the failure at one time to impose a penalty for a forbidden act furnishes an adequate ground for preventing the subsequent enforcement of a penalty which is specifically and unmistakably provided.

We are of opinion that the court below was clearly right in ruling that the decisions of this court indisputably establish that the mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guaranties and limitations of the 5th and 6th Amendments as to questions such as we are here passing upon. *Ex parte Milligan*, 4 Wall. 2, 121-127; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 336; *United States* v. *Joint Traffic Association*, 171 U. S. 505, 571; *McCray* v. *United States*, 195 U. S. 27, 61; *United States* v. *Cruce*, 243 U. S. 316, 326; *Hamilton* v. *Kentucky Distilleries Company*, 251 U. S. 146, 156. It follows that in testing the operation of the Constitution upon the subject here involved the question of the existence or non-existence of a state of war becomes negligible, and we put it out of view.

The sole remaining inquiry, therefore, is the certainty or uncertainty of the text in question, that is, whether the words "That it is hereby made unlawful for any person wilfully . . . to make any unjust or unreasonable rate or charge in handling or

dealing in or with any necessaries," constituted a fixing by Congress of an ascertainable standard of guilt and are adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them. That they are not, we are of opinion so clearly results from their mere statement as to render elaboration on the subject wholly unnecessary. Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below in its opinion to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury. And that this is not a mere abstraction, finds abundant demonstration in the cases now before us, since in the briefs in these cases the conflicting results which have arisen from the painstaking attempts of enlightened judges in seeking to carry out the statute in cases brought before them are vividly portrayed. As illustrative of this situation we append in the margin a statement from one of the briefs on the subject.* And again, this condition would be additionally obvious

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*In U. S. *vs.* Leonard, District Judge Rose of the Northern District of N. Y., held that in determining whether or not a price was unreasonable, the jury should take into consideration "what prices the defendants paid for the goods in the market—whether they bought them in the ordinary course of trade, paying the market price at the time, the length of time defendants have carried them in stock, the expense of carrying on the business, what a fair and reasonable profit on the goods would be, and all the other facts and circumstances in and about the transaction, but not how much the market price had advanced from the time the goods were purchased to the time they were sold."

In U. S. *vs.* Oglesby Grocery Co., District Judge Pitney of the Northern District of Georgia, said:

"The words used by Congress in reference to a well established course of business fairly indicate the usual and established mode of charging and getting profits time after time on a basis, coupled with some inflexibility in view of changed conditions. The statute may be construed to forbid in time of war, any de-

if we stopped to recur to the persistent efforts which, the records disclose, were made by administrative officers, doubtless inspired by a zealous effort to discharge their duty, to establish a standard of their own to be used as a basis to render the section possible of execution.

That it results from the consideration which we have stated that the section before us was void for repugnancy to the Constitution is not open to question. *United States v. Reese*, 92 U. S. 214, 219-220; *United States v. Brewer*, 139 U. S. 278, 288; *Todd v. United States*, 158 U. S. 278, 282; and see *United States v. Sharp*, 27 Fed. Cas. 1041, 1043; *Chicago & Northwestern R. R. Co. v. Dey*, 35 Fed. 866, 876; *United States v. Tozer*, 52 Fed. 917, 919-920; *United States v. Capital Traction Co.*, 34 App. D. C. 592; *United States v. Pennsylvania R. R. Co.*, 242 U. S. 208, 237-238.

But decided cases are referred to which it is insisted sustain the contrary view. *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86; *Nash v. United States*, 229 U. S. 373; *Fox v. State of Washington*, 236 U. S. 273; *Miller v. Strahl*, 239 U. S. 426; *Omaechevarria v. Idaho*, 246 U. S. 343. We need not stop to review them, however,

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parture from the usual and established scale of charges and prices in time of peace, which is not justified by some special circumstance of the commodity or dealer.''

Judge McCall of the Western District of Tennessee, in his charge to the grand jury, stated that, if a shoe dealer bought two orders of exactly the same kind of shoes at different times and at different prices, the first lot at $8 per pair and the second lot after the price had gone up to $12 per pair "and then he sells both lots of those shoes at eighteen dollars, he is profiteering clearly upon the first lot of that only cost him $8. Now he does that upon the theory that if he sells those shoes out and goes into the market and buys again he will have to pay the higher price, but that doesn't excuse him. He is entitled to make a reasonable profit, but he certainly hasn't the right to take advantage of the former low purchase and take the same profit on them that he gets on the twelve dollar shoes.''

In U. S. vs. Myatt, District Judge Connor, of the Eastern District of North Carolina, said:

''It will be observed that the statute does not declare it unlawful to make an unjust or unreasonable profit upon sugar. The profit made is not the test, and may be entirely irrelevant to the guilt of the defendant—he may within the language of the statute make an unreasonable and, therefore, unlawful 'rate or charge' without making any profit, or the rate or charge made may involve a loss to him upon the purchasing price.''

District Judge Hand, of the Northern District of N. Y., in his charge to the grand jury, said:

first, because their inappositeness is necessarily demonstrated when it is observed that if the contention as to their effect were true it would result, in view of the text of the statute, that no standard whatever was required, no information as to the nature and cause of the accusation was essential, and that it was competent to delegate legislative power, in the very teeth of the settled significance of the 5th and 6th Amendments and of other plainly applicable provisions of the Constitution; and second, because the cases relied upon all rested upon the conclusion that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded. Indeed, the distinction between the cases relied upon and those establishing the general principle to which we have referred, and which we now apply and uphold as a matter of reason and authority, is so clearly pointed out in decided cases that we deem it only necessary to cite them. *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, 223; *Collins* v. *Kentucky*, 234 U. S. 634, 637; *American Seeding Machine Co.* v. *Kentucky*, 236 U. S. 660, 662; and see *United States* v. *Pennsylvania R. R. Co.*, 242 U. S. 208, 237-238.

"Furthermore, it is not the particular profits that the individual himself makes which is the basis of the unreasonable charge, but it is whether the charge is such as gives unreasonable profit—not to him, but if established generally in the trade. The law does not mean to say that all people shall charge the same profit. If I am a particularly skilled merchant or manufacturer and I can make profits which are greater than the run of people in my business, I am allowed to make those profits. So much am I allowed, but if I am charging more than a reasonable price, taking the industry as a whole, I am not allowed to keep that profit because on other items I am sustaining a loss."

In U. S. vs. Goldberg, District Judge Bledsoe, of the Southern District of California, charged the jury that, in passing on the question of the reasonableness of prices for sugar the jury should take into consideration, among other circumstances, the following:

"That there was, if you find that there was, a market price here in the community or generally with respect to the profit that normally should be made upon sugar sold either by manufacturers or jobbers and retailers."

In U. S. vs. Culbertson, etc. Co., District Judge Neikirk, of the Eastern District of Washington, on the trial of defendant on July 8, 1920, charged the jury, among other things, that as a matter of law, defendant was entitled to sell its goods on the basis of the actual market price at the time and place of sale over and above the expense of handling the goods, and a reasonable profit, and that the original cost price became immaterial, except as it threw some light upon the market value.

It follows from what we have said that, not forgetful of our duty to sustain the constitutionality of the statute if ground can possibly be found to do so, we are nevertheless compelled in this case to say that we think the court below was clearly right in holding the statute void for repugnancy to the Constitution, and its judgment quashing the indictment on that ground must be, and it is, hereby affirmed.

Affirmed.

Mr. Justice PITNEY concurs in the result.